Speculum Juris Anglicani,

OR, A

VIEW of the LAWS OF ENGLAND,

AS

They are divided into STATUTES, COMMON-LAW and CUSTOMS:

Incidently,

Of the *Customs* appertaining to the Famous City of *LONDON*, never before Printed; together with Resolutions on several of them, given by the Reverend Judges at *Westminster*.

By *JOHN BRIDALL*, of *Lincolnes-Inne*, Barrester.

The Interpreter of *Sophocles*.

Νόμος ἐστὶν ἔγγραφος συνήθεια, συνήθεια δ' ἄγραφος Νόμος, i. e. *A Law is a Written Custom, and a Custom is an Unwritten Law.*

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CONSILIO à SECRETIS,

Mœcenati ſuo Colendiſſimo,

JOHANNES BRIDALL

Celeberrimi *Lincolnienſis* Hoſpitii

Socius, Opus hoc Tenuiſſimum

Humillimè D. D D. Conſecrátque.

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SPECULUM

SPECULUM
JURIS ANGLICANI:
Or, A View of the
LAWS of ENGLAND,
As they are divided into
Statutes, Common-Law, & Customs.

AS the *Greeks* and *Romans* have divided their Laws, ſo have we the Laws of this Realm, into Laws Written and Unwritten, which we commonly tearm Statutes and Cuſtoms; according to this Diviſion ſhall my procedure be in this enſuing Tract.

Conſtat jus noſtrum quo utimur aut Scripto, aut ſine Scripto, ut apud Græcos τῶν νόμων οἱ μὲν ἄγραφοι, οἱ δὲ ἔγγραφοι. Inſt. lib. 1. tit. 2.

I. *Of the Laws Written, called Statutes or Acts of Parliament.*

STatute-Laws are Acts of Parliament, made by our Sovereign Lord the King, and his Royal Progenitors, and by the Lords Spiritual and Temporal, and the

Doct. & Stud. lib 1. cap. 11.

Commons of the Realm, in divers Seſſions of Parliament, in ſuch Caſes where the Law of Reaſon, the Law of God, Cuſtoms, Maxims, nor other Grounds of the Law of *England*, ſeemed not to be ſufficient, to puniſh Evil men, and to reward Good men.

Having ſhewed you what our Statute-Laws, or Laws written are, I ſhall come 1. To treat of the place or Court where theſe Laws written are enacted, 2. To propoſe ſeveral Queries, with their Reſolutions, and 3. Set down ſuch Rules as I have met withall in our Books, for the Expoſition, and Interpretation of Statutes, or Acts of Parliament.

The place, where Statutes, or Laws written are made, as you have ſeen already, is the High Court of Parliament; in Relation to which place are worthy of obſervation, the ſeveral Appellations given to it, its Antiquity, its Honour, and Dignity, its Juriſdiction and Authority.

1. Of its ſeveral Appellations.

A Parliament was called before the Conqueſt, Michael Synoth, Michael Gemote, Ealſa witenage Mote, That is to ſay, *The Great Synod, or meeting of the King, and of the Wiſe men*: The Latine writers of that, and the enſuing Age called

ed it; *Commune Concilium, Curiam Altissimam, Generale Placitum, Curiam Magnam, Magnatum Conventum, Praesentiam Regis, Prælatorum, Procerumque Collectorum, Commune totius Regni Concilium, Assisa Generalis, &c.* The Common Council, the Highest Court, the General Plea, the Great Court, the meeting of States, the Presence of the King, Prelates, and Peers assembled together, the publick Council of the whole Kingdom, &c.

Tully calls it *Consessum Senatorum, à Considendo.* This Court the French-men call, **L'estates** or **L'assemble des Estates**: In *Germany* it is called *A Dyet.* For those other Courts in *France*, that are called *Parliaments*, they are but ordinary Courts of Justice, where mens Causes and Differences are publickly determined without further Appeal; whereof there be seven in number, as 1. *Paris*, 2. *Tholouse*, 3. *Grenoble*, 4. *Aix*, 5. *Burdeaux*, 6. *Dyon*, 7. *Roane.*

It appeareth, that divers Parliaments have been holden long before, and untill the time of *William* the Conquerour, which be in print, and many more appearing in ancient Records, and Manuscripts. 2. Of its Antiquity. *Co. Lit.* 110. *a.*

In the Mirror are theſe words, **Pur l'eſtate del Royalme fiſt le Roy Alfred aſſembler les Comiters et ordeine, &c.** *King* Alfred *ordaineth for an uſage perpetuall, that twice in the year, or oftner if need be, they ſhall aſſemble themſelves at* London, *to treat in Parliament of the Government of the people of God, how they ſhould keep themſelves from Sin, ſhould live in Quiet, and ſhould receive Right, by certain Laws, and Holy Judgments, &c.*

cap 1. *ſect.* 3.

Co. Litt. 110. *a.*

The Concluſion of that great Parliament, holden by King *Athelſtan* at *Grateley*, are theſe words: *All this was enacted in that Great Synod, or Council at* Grateley, *whereat was the Archbiſhop* Wolfehelm, *with all the Noble-men, and Wiſe-men, which King* Athelſtan *called together.*

3. Of its Honour and Dignity.

The Honour and Dignity of this Court of Parliament appeareth in this, that it conſiſts of ſo noble parts:

Firſt, Of the Kings moſt Excellent Majeſty, ſitting there in his Royal Politique Capacity: He being *Caput, principium, & finis* of it, ſolely made, and created by him, and into him only can be ultimately reſolved.

Co. Litt. f. 110. *a.*

None can begin, ſayes *Coke*, continue, prorogue, adjourn, or diſſolve this Court, but by the Kings Authority. It

It doth not appear, ſayes another, by the firſt Record of Summons now extant, *Anno* 49 *Ed.* 3. by what Warrant the Lord Chancellor cauſed the Writs of Summons to be made, the King was then Priſoner to *Mountford* his ſometime Minion: But ſurely, none but the King can ſummon a Parliament: And this is the Reaſon that *H.* 4. having taken his Liege Lord *R.* 2. priſoner, on the 20th day of *Auguſt*, *Anno* 23. did cauſe the Writs of Summons for the Parliament wherein he obtained the Crown, to bear date the 19th day of the ſame month, and the Warrant to be *per ipſum Regem, & Conſilium*, and himſelf to be ſummoned, by the name of *H.* Duke of *Lancaſter*.

Secondly, Of the three Eſtates of the Realm, *viz.*

1. Of the Lords Spiritual, as Archbiſhops, and Biſhops, ſitting there by ſucceſſion, in reſpect of their Baronies, parcel of their Biſhopricks, which they hold alſo in their politique capacity. *Co.* 4. *Inſt. f.* 1.

2. Of Lords Temporal, as Dukes, Marqueſſes, Earls, Viſcounts, and Barons, who ſit there by reaſon of their Dignities, which they hold by Deſcent or Creation. *Co. Litt. f.* 109. *b.* 110. *a.*

3. Of the Commons of the Realm, who are divided into three parts: Into Knights of Shires, or Counties, into Citizens out of Cities, and into Burgeſſes out of Boroughs.

Co. 4. Inſt. f. 2. The King, and theſe three Eſtates are the great Corporation, or Body Politique of the *Engliſh* Nation, and do ſit in two Houſes, *viz.* the King, the Lords Spiritual and Lords Temporal in one Houſe, called the Lords Houſe; and the Knights, Citizens, and Burgeſſes in another Houſe, called the Houſe of Commons. But of antient time both Houſes ſate together; and if the King pleaſeth, he may have the Lords, and Commons ſit together again in one place: As they did *Anno* 7 *Jac.* in the Court of Requeſts; The Lords ſitting on the Right hand by themſelves, and the Commons on the Left hand.

Elſing.

Theſe two Houſes are diſtinct Courts for many purpoſes, as the proceeding upon a Writ of Error ſhall only be before the Lords in the upper Houſe, *ſecundum legem, & conſuetudinem Parliamenti.*

Co. 4. Inſt. 21, & 28. The Houſe of Commons is not prorogued or adjourned, by the Prorogation, or Adjournment of the Lords Houſe; but the Speaker upon ſignification of the Kings

Kings pleaſure, by the Aſſent of the Houſe of Commons doth ſay: This Court doth prorogue, or adjourn it ſelf; and then it is prorogued, or adjourned, and not before. But when it is diſſolved, the Houſe of Commons are ſent for up to the Higher Houſe, and there the Lord Chancellour, or Lord Keeper by the Kings Commandment diſſolveth the Parliament, and then it is diſſolved, and not before.

4. Of its Juriſdiction, and Authority.

The Power, Authority, and Juriſdiction of this Supream Court, is declared by Mr. *Cambden*, and Sir *Edw. Coke*.

This Court, ſaith the former perſon, hath Soveraign and Sacred Authority, in making, confirming, repealing and expounding Laws, in reſtoring ſuch as be attainted or outlawed to their former Eſtates, in deciding of the hardeſt Controverſies betwixt private perſons, and to ſpeak at a word, in all Cauſes which may concern either the ſafety of the State, or any private perſon whatſoever. The Juriſdiction of this Court, ſayes the latter, is ſo tranſcendent and abſolute, as it cannot be confined either for Cauſes or Perſons within any Bounds: It maketh, enlargeth, diminiſheth, abrogateth, repealeth, and reviveth Laws, Statutes, Acts and Ordinances,

Co. Litt. 110. *a.* 4 *Inſt. f.* 36.

nances, concerning matters Eccleſiaſtical, Capital, Criminal, Common, Civil, Martial, Maritime, and the reſt: It can make Daughters, and Heirs apparent of a man, or woman, to inherit, during the Life of the Anceſtor; adjudge an Infant, or Minor of full Age; attaint a man of Treaſon after his death; It may baſtardize a Child that is Legitimate; it can make a Baſtard Legitimate, that was born before marriage; It can naturalize a meer Alien, and make him a Subject born, *&c.*

By what has been ſaid of this Court, I may very well repeat the ſaying of one: *Si antiquitatem ſpectes, eſt vetuſtiſſima; ſi dignitatem, eſt honoratiſſima; ſi juriſdictionem, eſt capaciſſima.* Thus much may ſuffice as to the Court, where Statutes are made, I proceed to my Queries.

2. *Certain Quæries, relating to Affairs Parliamentary, and to Acts of Parliament.*

Quære 1. *Whether a Threefold Conſent is an Inſeparable Incident to an Act of Parliament.*

Reſ. The King, and the Three Eſtates, *viz.* The

The Lords Spiritual, the Lords Temporal, and the Commons, may joyntly, and with one conſent, or agreement, eſtabliſh, and enact any Lawes, Orders, and Statutes for the Benefit, and Safety of the Realm; but being divided, and one ſwerving from the other, they can do nothing: For the King though he be head, yet alone he cannot make any Law, nor yet the King and his Lords only can make any Law, nor yet the King and his Commons alone, neither yet can the Lords and Commons without the King do any thing: and therefore to the making of a Statute, or Act of Parliament there muſt be the conſent of the King, Lords and Commons; and this manifeſtly appears in our Books of Law.

Every Statute, ſayes *Coke*, muſt be made by the King, with the Aſſent of the Lords, and Commons, and if it appear by the Act, that it was made by two of them only, it is no Statute. *Co. Litt.* 159. *b.*

Again: There is no Act of Parliament, but muſt have the Conſent of the Lords, and Commons, and the Royal Aſſent of the King, and whatſoever paſſeth in Parliament by this threefold Conſent hath the force of an Act of Parliament. *Co.* 4. *Inſt.* 25. *Ye. Co.* 2. *Inſt. fol.* 157, 158.

In

In the Year-Book of *H.* 7. it appears, That in a Parliament the King would, that such a one should be attainted, and forfeit his Lands, and the Lords assented, omitting the Commons; It was therefore adjudged by the Kings Justices, That it was a void Act, and the party was restored.

4 *H.* 7. 18. *b.*

As a threefold Consent is necessary to the production of a new Law, so likewise it is requisite to the Declaration of a Treason within the Statute of 25 *E.* 3. As for Example.

John Duke of *Gwyen*, and of *Lancaster*, Steward of *England*, and *Thomas* Duke of *Gloucester*, Constable of *England*, the Kings Unkles, complained to the King, That *Thomas Talbot* Knight, with other his Adherents, conspired the death of the said Dukes, in divers parts of *Cheshire*, as the same was confessed, and well known, and prayed that the Parliament might judge of the fault; (which Petition was just, and according to the branch of the Statute of 25 *E.* 3.) but the Record saith further: Whereupon the King, and Lords in Parliament adjudged the same fact to be open, and high Treason; Which Judgement wanting the assent of the Commons, was

Rot. Parl. 17. *R.* 2, *nu.* 20.

Co. 3. *Inst.* 22.

no

no declaration within the Act of 25 *E.* 3. becauſe it was not by the King and his Parliament according to the ſaid Act, but by the King, and Lords only.

Note: Though Laws, or Statutes of Right (as it hath been made appear) ought to paſs in Parliament, yet the Kings of this Nation have not diveſted themſelves of their Royal Power, nor granted the Lords and Commons a concurring power in making of Lawes: For it is as clear as the Sun at Noon-day, That a King of *England* is as free, and abſolute in a Seſſion of Parliament, as out: And the Act of a King in Parliament, is the free, and voluntary Act of an abſolute Monarch; For the Act of his Majeſty in Parliament, paſſed by the aſſent of the Lords Spiritual, and Temporal, and at the Petition of the Commons, is not leſs the Act of the King, becauſe it is ſo paſſed, unleſs a man will deny, that my Will, being a faculty of my Soul, cannot imperate an Act, if it takes information from my Underſtanding, or Reaſon; and underſtanding being in proportion to my will, as Counſell is to a Law. And this is not diſagreeable to the words of *Grotius*:

Mr. Roger Coke, lic. 3. c. 3. of the Municipal Laws of England.

Multum

Lib. 1. c. 3. sect. 18. de jure belli ac pacis.

Multum falluntur, qui existimant, cum Reges Acta quædam sua nolunt rata esse nisi à Senatu, aut alio cœtu aliquo probentur, partitionem fieri potestatis: Nam quæ acta eum in modum rescinduntur, intelligi debent rescindi Regis ipsius imperio qui eo modo sibi cavere voluit, ne quid fallaciter impetratum, pro vera ipsius voluntate haberetur. Quale erat Antiochi tertii Regis Rescriptum ad Magistratus ne sibi parerent, siquid Legibus adversum jussisset.

Quære 2. *Whether from those Laws, wherein the Assent of King, Lords, and Commons, is not at length expressed, it may be gathered, that Statutes have been made, and binding, without the Triple Consent?*

Res. The Order of Parliament hath been so well known to all English-men, and so undoubted, that the same happily hath given occasion to the Writers, who have recorded the Acts, and Statutes, not to be Curious in a matter perspicuous, and certain, neither at all times to express the ordinary, and whole sight of the Parliament, and Estates assembled, and consenting thereunto, but to express the same in sundry, and (as it may seem at first) divers manner of words, yet signifying at all

all times one meaning, one and the ſame thing.

Sometimes it is ſaid, *Our Soveraign Lord the King, by Aſſent of the Prelates, Earls, Barons, and other Great men, and all the Commonalty ſummoned to the Parliament, hath ordained and eſtabliſhed*, &c. In which words the Style is fully, and wholly expreſſed. 2 E. 3.

Sometimes it is ſaid thus, *It was provided, and granted as well of the aforeſaid Archbiſhops, Biſhops, Earles and Barons, as of the King himſelf, and others*; where no expreſs mention is made of the Commons. 20 H. 3. *Merton.*

In another place, *In the preſence of certain Reverend Fathers, Biſhops of England, and others of the Kings Councill, the Conſtitutions under-written were recited, and after had and publiſhed*, &c. In which words no expreſs mention ſeemeth to be made of the Lords Temporal, or Commons. 4 E. 1. *Stat. de Bigamis.*

Sometime, *Our Soveraign Lord the King, for the Relief of his people, hath provided and eſtabliſhed theſe Acts underwritten.* In which words no expreſs mention is made expreſſely of any of the Three Eſtates. 6 E. 1. *Stat. of* Glocest.

So

13 Ed. 1. Stat. 8. Acton Burnell.

So again, *The King himself, and his Councill, hath ordained, eſtabliſhed, &c.* Where no mention is made expreſſely of any of the Three Eſtates.

Anno 39 E. 3.

Our Soveraign Lord the King, by the Aſſent and expreſs wills of the Dukes, Earls, Barons, and Commons of the Realm, and of all other whom theſe touch, &c. there is no expreſs mention alſo of the Lords Spiritual.

11 H 7. c. 17.

It is ordained, and enacted by the Authority of this preſent Parliament, &c. The Authority of our Soveraign, and Aſſent of the three Eſtates is not expreſſed in words, and yet no man doubteth thereof.

Of which places, and other like, it is not to be inferred, becauſe the Aſſent of the Three Eſtates is not at all times in plain words, and at length expreſſed, That before the Soveraign did enact, and eſtabliſh Laws of Parliament, either by himſelf, and his Council without the Aſſent of the Three Eſtates, as ſome words ſeem to import, either by Aſſent of one Eſtate without the other two, or by the Aſſent of two Eſtates without the third, as a Light Reader may by form of words ſeem to perſwade himſelf: But when

when it is ſaid, that the Soveraign called his Parliament, and cauſed Statutes to be made, and enacted, It is to be underſtood, that the King did the ſame orderly, by the form of his Parliament, that is to ſay, by his Authority, with the Aſſent of all the Three Eſtates ſummoned, to wit, the Lords Spiritual, and Temporal, and the Commons.

Whether an Act of Parliament may paſs by the Temporal Lords only, the Spiritual Lords being all preſent, but diſagreeing, and diſſenting to the Act? Quære 3.

That thoſe Acts of Parliament are good, which paſs by the Temporal Lords only, though all the Biſhops diſagree, it is manifeſt by the Courſe of all Parliaments; for the Biſhops ſit in Parliament, not as they are Spiritual men, but by reaſon of their Temporal Baronies annexed to their Dignities; *Non ratione Nobilitatis*, as *Stamford* ſpeaks, *Pl. Coron.* f. 153. *ſed Ratione Officii.* And therefore if the voyces of the greater number of Temporal Lords exceed theirs, the Act ſhall paſs as the Act of the whole Lords Houſe, and their voyces ſhall be involved in the greates *Reſ.*

greater number of the Temporal Lords; and ſo ſhall be the Act of all the Lords, as well Temporal as Spiritual. And ſo is the Book of 11 *H.* 7. *f.* 27. *Br. Parl.* 107. And ſo is the Act-Roll of 1 *Eliz.* *Ex Aſſenſu omnium Dominorum tam Spiritualium, quam Temporalium.* Which Act paſſed by the Aſſent of that Queen, her Temporal Lords, and Commons (all the Spiritual Lords diſagreeing) which, if no good Act, then is not our Religion confirmed by Parliament.

Quære 4. *Whether an Act of Parliament may paſs, all the Spiritual Lords abſenting themſelves from the Houſe of Peers?*

Reſ. It is thought it may: That this Opinion may not ſeem ſtrange, it ſhall be backed by Authority, by Example, and Reaſons.

1. For *Authority* in Law. It is the Reſolution of all the Judges in *England*: 7 *H.* 8. 184. *Kelwayes* Reports, in theſe words; Noſtre Sñr le Roy poit aſſets bien tener ſon Parliament pur Luy, ſes Sñrs Temporal, et Commons tout ſans le Spiritual Sñrs, &c. *Our Lord the King may well enough hold his Parliament*

ment by himself, his Lords Temporal and Commons, without the Spiritual Lords at all.

2. By *Example:* The Parliament summoned at *Emonds-Bury*, was a good Parliament, and yet all the Prelates were excluded, and upon very great reasons: King *E.* 1. being exercised in Martial Affairs, levyed a great Summe of money of Layety and Clergy for the Supply of his wants; the whole Clergy refused, upon a Constitution of Pope *Boniface* the 8th. *That if any Clerk gave to a Lay-man any part of his Spiritual Goods, he should forthwith stand excommunicate:* Whereupon, at this Parliament, by the King, the Temporall Lords, and Commons, (all the Bishops, and Clergy excluded) it was enacted, *That their Persons should be out of the Kings Protection, and their Goods subject to Confiscation, till they submitted themselves to the Kings Favour, and yielded their Obedience.* 24 *E.* 1. Lamb *Peramb. of Kent* f 276. Char.

So in the Parliament of 11 *R.* 2. The Appeals, Judgments and Executions of that Parliament were approved, notwithstanding all the Spiritual Lords were absent. And *Rot. Parl.* 11 *R.* 2. *m.* 6. *Artic.* 9. the Cause of their absence is

there at large ſet down by a notable Proteſtation of *William* Archbiſhop of *Canterbury*, in behalf of him, and his Clergy.

3. By *Reaſon*: It would be miſchievous, if in ſome Caſes Acts ſhould not be made without the Biſhops; for no Biſhop is by his Order to come to the Parliament, when Judgment of Death is given upon any man, as notably appears by the Stat. of 11 *R.* 2. *c.* 13. And at this time the Baronage is wholly in the Temporal Lords to paſs ſuch an Act. For no Biſhop is a Baron in reſpect of his perſon, but of his Temporalties, which is the Reaſon that he is not tryed by his Peers, as the Temporal Lords are, but by Ordinary Juries, as fell out in the Caſe of *Fiſher* Biſhop of *Rocheſter*, *temp. H.* 8. And *Cranmer* Archbiſhop of *Canterbury*, 1 *Mar.* who were both tryed by Common Juries.

Quære 5. *What if the King, and Spiritual Lords, with the Commons do paſs an Act, all the Temporal Lords diſſenting, or not being there, whether this be a good Act of Parliament?*

Reſ. We may very well hold, that it is: and

and the Votes of the Temporal Lords are included in the Votes of the Spiritual.

Whether the Conſent of the Biſhops to an Act of Parliament can be Conditional? Quære 6.

A Bill was preferred at the Parliament holden in *Anno* 6 *H.* 6. that no man ſhould contract, or marry himſelf to any Queen Dowager of *England* without ſpecial Licenſe and Aſſent of the King, on pain to loſe all his Goods, and Lands; the Biſhops and Clergy aſsented to this Bill by the word of (*Content*) as farre forth as the ſame ſwerved not from the Law of God, and of the Church, and ſo as the ſame imported no deadly ſin. The Entry of the ſaid Act of 6 *H.* 6. in the Roll is: *It is enacted by the King, Lords Temporall, and Commons, that no man ſhould contract, or marry himſelf to any Queen of England, without, &c.* This is holden to be an Act of Parliament, for that the Aſsent of the Clergy could not be Conditional. *Reſ.* *Rot. Par.* 6 *H.* 6. *nu* 27. *Co.* 4. *Inſt.* 34, & 35.

If a Lord of Parliament makes a Proxy to three Lords, and one of the Procurators gives conſent, the other two ſay, Not content, whether this be a voyce? Quære 7.

Resp. A Lord of Parliament, by Licenſe obtained of the Queen, made a Proxy to three Lords of Parliament, *Conjunctim, & diviſim*, &c. And one of the Procurators gave conſent to a Bill, and the two others ſaid, *Not Content*. And firſt it was by Order of the Lords debated amongſt the Judges, and Civilians Attendants, and conceived by them, that this was no voice, and the Opinion was affirmed by the Lords of Parliament *ſeriatim*.

At the Parliament holden *Ann.* 1. *Eliz.*

Co. 4. *Inſt.* 13, & 14.

Quære 8. *If a Lord of Parliament make a Proxy, and after come into the Lords Houſe of Parliament, and ſit there without arguing, conſenting, or ſpeaking any thing, whether this be a Countermand, or Revocation in Law of his Proxy.*

Reſp. It was conceived by the Judges, and Civilians, that his ſitting there, without ſaying any thing, was a Revocation in Law of his Proxy; *à fortiori* if he moved, or ſpake to any matter there propounded: and their Opinion was reſolved by the Lords *ſeriatim*.

Co. 4. *Inſt.* 13.

Quære 9. *Whether Proxies can be made to any, that are not members of the Houſe of Lords?*

In

In the Bundle of Proxies *Anno* 5 *H.* 5. it appeareth that in thoſe dayes a Spiritual Lord of Parliament might have made his Proxy to the Procurators of the Clergy, or to any other Clerk, but at this day he cannot make it but to a Lord of Parliament. *Reſ.* *Co.* 4. *Inſt.* 12.

In the High Court of Parliament, the Barons may give their Votes by Proxy; But the Procurators ought to be Barons, and members of the ſame Houſe, for a Stranger is not capable of ſuch a Proxy. *Davys Reports, f.* 47. *b.* De capitulariter congregatis.

Our Law is agreeable with the Canon Law in this point:

Abſens non poteſt demandare votum niſi uni de Capitulo. *Inſt. Juris Can. Lib.* 1. Cap. Electionibus.

Oportet quod Procurator ſemper inſtitutus ſit de Collegio.

Whether a Proxy can be to a Lord, that is abſent himſelf? Quære 10.

A Proxy cannot be made unto a Lord that is abſent himſelf: as 34 *H.* 8. *in fine Lib. Journal*, this Entrance is: *viz.* *Reſ.*

The Lord Latimer *ſent his Proxy, which the Clerk received, but was repealed by the Lord Chancellor, for the Lord* Latimers *Deputies were not preſent.*

So it is if the Lord, to whom the Proxy is made, yea although the Procurator be absent (*Ex Licentia Regis*) and hath made a Procurator for himself; For Proxy is but an Authority, to give another mans Assent, which cannot be transferred to a Third Person.

Quæst. 11. *Whether all matters in Parliament ought to be determined by the Course of Parliament?*

Resp. As every Court, sayes *Coke*, hath Laws, and Customs for its direction, some by the Common Law, some by the Civil, and Canon Law, some by peculiar Laws, and Customs, *&c.* So the High Court of Parliament, *Suis propriis Legibus & consuetudinibus subsistit.* It is *Lex & Consuetudo Parliamenti*, that all weighty matters in any Parliament moved concerning the Peers of the Realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed by the Course of Parliament, and not by the Civil Law, nor yet by the Common Laws of this Realm used in more Inferiour Courts; which was so declared to be *secundum Legem & Consuetudinem Par-*

Co. 4. Inst. 14, 15. & 50. lib. 13. fol. 63.

Parliamenti, concerning the Peers of the Realm, by the King, and all the Lords Spiritual, and Temporal; and the like, *Pari Ratione*, is for the Commons for any thing moved, or done in the Houſe of Commons: and the rather, for that by another Law, and Cuſtom of Parliament, the King cannot take notice of any thing ſaid, or done in the Houſe of Commons, but by the report of the Houſe of Commons: And every Member of the Parliament hath a Judicial place and can be no witneſs. And this is the Reaſon that Judges ought not to give any opinion of a matter of Parliament, becauſe it is not to be decided by the Common Laws, but *ſecundum Legem & Conſuetudinem Parliamenti*: and ſo the Judges in divers Parliaments have Confeſsed.

Whether Acts againſt the Power of a Parliament ſubſequent can bind? Quære 12.

An Article of the Statute made in 11 *R.* 2. *c.* 5. that no perſon ſhould attempt to revoke any Ordinance then made, is repealed, for that ſuch Reſtraint is againſt the Juriſdiction, and power of the Parliament, the Liberty of the Subject, and unreaſonable. *Reſ.* *Co.* 4. *Inſt.* 42.

Ibid. So the last Will, and Testament of *R.* 2. under the Great Seal, Privy Seal, and Privy Signet, whereby he devised certain Money, Treasure, *&c.* to his Successors upon Condition, to observe all the Acts, and Orders at the Parliament holden in *Anno* 21. of his Reign, was holden unjust, and unlawfull, for that it restrained the Soveraign Liberty of the Kings his Successors.

So if an Act of Parliament be made wherein there is a Clause contained, that it shall not be Lawfull for the King by Authority of Parliament, during the space of seven years to repeal, and determine the same Act, this is a voyd Clause, and such Act may be repealed within the seven years, and yet if the Parliament should enact in the nature of an ancient *Lex Regia*, that there should be no more Parliaments held, but that the King should have the Authority of the Parliament, this Act, sayes my Lord *Bacon*, were good in Law, *quia potestas suprema seipsum dissolvere potest, Ligare non potest.*

Co. 4. Inst. 43. Though divers Parliaments, sayes *Coke*, have attempted to barre, restrain, suspend, qualifie, or make void subsequent Parliaments, yet could they never effect it, for the

the latter Parliament hath ever power to abrogate, ſuſpend, qualifie, explain, or make void the former in the whole, or in any part thereof, notwithſtanding any words of Reſtraint, prohibition or penalty in the former: For it is a Maxim in the Law of Parliament, *Quod Leges poſteriores priores contrarias abrogant.* With our Lawyers do agree the Civilians. *Vid. Co. lib. 2. f. 46. B. of Cant. caſe. Cro. Jac. Langhton v. Gardiner.*

Conſtitutiones tempore poſteriores, potiores ſunt his, quæ ipſas præceſſerint. D. 1. 4. 4.

Legis humanæ natura eſt ut à voluntate humana pendeat, non in Origine tantùm, ſed & in duratione. Grot. lib. 2. c. 20. ſect. 24. *de jure belli ac pacis.*

Whether Acts of Parliament ſhall take Effect, and work from the Beginning of the Parliament, or Seſſion? Quære 13.

Reſ.

All Acts of Parliament relate to the firſt day of Parliament; if it be not otherwiſe provided by the Act. *Co. 4. In. 25. 33 H. 6. 17. 3 H. 8 Br. Parliament. 86. Plowd. f. 79. b Hob. Rep. f. 11. & 222.*

All Acts of Parliament have their Effects from the beginning of the Parliament, or ſeveral Seſſion of Parliament, except the Act it ſelf appoint another Term, from which it is to take his Effect.

Whether the conſent of every Subject be included in an Act of Parliament? Quære 14.

If

Reſ. If Tenant in Tayle maketh a Leaſe for three Lives according to the Statute of 32 *H.* 8. *c.* 28. that is no diſcontinuance of the Eſtate Tayle, or of the Reverſion, becauſe it is authoriſed by Act of Parliament, whereunto every man in Judgment of Law is party.

Co. Litt. 333. 4.

Hob. Rep. Dancomb. v. Wingfield. f. 156.

An Act of Parliament hath every mans conſent, as well to come, as preſent.

Vid. plus Co. Litt. f. 95. b. *Lib.* 6. *Viſcount Mountagues Caſe f.* 27. b. *Morrices Caſe f.* 12. b.

Quære 15.

Reſ. *Whether Statutes now made can have a Retroſpection to matters that be paſt?*

The Statute of *Gloceſter*, cap. 3. extendeth to all Alienations made after the Statute, and not before; for it is a Rule, and Law of Parliament, that Regularly, *Nova Conſtitutio futuris formam imponere debet, non præteritis.*

Co. 2. *Inſt.* f. 292.

So the Stat. of *Gloc. c.* 6. extends to the future and not to the time paſt, and yet being made in Affirmance of the Common Law, the ſame Law that guideth *in futuro*, ruleth alſo *in præterito*. With our Law does the Civil Law concurre in this point:

Co 2. *Inſt.* f. 308.

Omnia Conſtituta non præteritis Calumniam faciunt, ſed futuris Regulam imponunt.

munt. Leges futuris regulam imponunt, non præteritis.

Whether the General Words of an Act of Parliament can be abridged by Equity? Quære 16.

Equity is in two ſorts, differing much the one from the other, and are of contrary effects, for the one doth abridge, diminiſh, and take from the Letter of the Law, the other doth inlarge, amplifie, and adde thereunto. The former is thus defined by *Ariſtotle*, viz. *Æquitas eſt Correctio Legis generatim latæ, qua parte deficit*: Equity is the Correction of a Law generally made in that part wherein it faileth, which correction of the general words is much uſed in our Law. As for Example, When an Act of Parliament is made, that whoſoever doth ſuch a thing ſhall be a Felon, and ſhall ſuffer death; yet if a Mad-man, or an Infant of young years that hath no diſcretion, do the ſame, they ſhall be no Felons, nor ſuffer death therefore. *Reſ.* *Plowd. Com. Eyſton v. Studd.*

So if a Statute were made, That all perſons, that ſhall receive, or give meat, and drink, or other ſuccour to any that ſhall do ſuch a thing, ſhall be acceſſary

Plowd. Com. f. 465. a. Eyston v. Studde.

acceſſary to his Offence, and ſhall ſuffer death if they did know of the Fact, yet notwithſtanding one doth ſuch an Act, and cometh to his wife, who knowing thereof, doth receive him, and gives him meat, and drink, ſhe ſhall not be acceſſary, nor Felon; for in the generality of the ſaid words of the Law, he that is mad, nor the Infant, nor his wife were included in meaning.

Ibid.

So the Stat. of *Champerty* prohibiteth men generally, to receive Lands, or Tenements untill the thing be in plea, and yet in *M.* 19. *R.* 2. it was ſaid by all the Court in a Writ of *Champerty*, that if I bargain any Land, before any Writ brought againſt me, and after the Writ purchaſed, I deliver Seizin, that the Writ of *Champerty* ſhall not lye, becauſe it ſhall not be intended, that the Bargain was made for ſuch Caſe, and ſo that which is within the words of the Act, is out of the purview of the Act.

By theſe Caſes it is manifeſt, that the general words of a Law may by Equity be abridged.

Quære 17. *Whether the Judges be bound to take notice of Statutes without pleading of them?*

Statutes

Ref.

Statutes are either General or Particular; General Laws need not to be pleaded, nor any part of them: But the Court neither needs, nor can take knowledge of any particular Statute, except it be pleaded. *Vid. Co. Lib. 4. Hollands Case: Cro. 2. part. Armiger v. Holland f.* 601. *Cro. 2. part. Talentine v. Denton. Hob. Rep. Needler v. Bp. of Winchester*, 227. *Yelvertons Reports Jennings v. Haythwait.*

Vid. Co. lib. 5. Elmers case. f. 2. a.

Thus much for the Quæries, relating to Acts, and Affairs of Parliament, I proceed to the third matter proposed, *viz. The Rules for the expounding, and interpreting Statutes or Acts of Parliament.*

Acts of Parliament, *sayes one*, are positive Laws, which consist of two parts, that is to say, of the words of the Act, and of the sense, or meaning thereof, and they both joyned together make the Law: In respect of the Words, Exposition is made use of by Lawyers; And as for the Sense and meaning of a Law, Interpretation: Now that betwixt an Exposition, and an Interpretation there is a Diversity in our Law, you may for proof accept the words of St. *Jermin, viz. Truth it is, that sometime the intent of the Statute shall be taken further*

Doctor & Stud. lib. 1. c. 28.

further than the expreſs Letter ſtretcheth, but yet there may no intent be taken againſt the expreſs words of the Statute, for that ſhould rather be an Interpretation of the Statute, than an Expoſition.

3. *The Rules for expounding and interpreting Acts of Parliament.*

Rule 1.

Co. Litt. 381. a. 4 Inſt. 325. lib. 3. Lincoln Coll. Caſe. lib. 8. Bonhams Caſe.

IT is a Rule in our Law, *That it is the moſt natural, and genuine Expoſition of a Statute to conſtrue one part of the Statute by another part of the Statute, for that beſt expreſſeth the meaning of the Makers:* Or,

Every Act of Parliament, upon Conſideration had of all the parts thereof together, is the beſt Expoſitor of it ſelf.

As in *Littleton*, Sect. 728. the Queſtion upon the general words of the Stat. of *Gloceſter*, is, *Whether a Fine levyed by a Husband ſeiſed in the Right of his Wife with Warranty, ſhall barre the Heir without Aſſetts?* And it is well expounded by the former part of the Act, whereby it is enacted, That alienation made by Tenant by the Courteſie with Warranty, ſhall not barre the Heir, unleſs Aſſetts deſcend. And therefore it ſhould be inconvenient

to

to intend the Statute in ſuch manner, as that he that hath nothing but in the Right of his Wife, ſhould by his Fine levyed with Warranty barre the Heir without Aſſetts. And this Expoſition is, *ex viſceribus Actûs.*

This manner of expounding Laws is uſual amongſt the Civilians.

Incivile eſt (ſaith the Civil Law Text) *niſi tota Lege perſpecta, una aliqua particula ejus propoſita, judicare vel reſpondere.* D. 1. 3. 24. de tota lege inſpicienda.

The Words of an Act of Parliament muſt be taken in a Lawfull, and Rightfull ſenſe. Rule 2.

As the Statutes which confirm the Cuſtoms of *London* ſhall not be conſtrued for the confirmation of any unreaſonable Cuſtom, which has been uſed in *London.* Dav. Reports, Le Caſe de Con. 75. b.

So the Stat. of *Gloceſter* provides, That if the Husband being ſeized of Land in the Right of his Wife, alien the Land with Warranty in the Life of the Wife, it ſhall not be a Barre to the Heir of the Wife, if no Fine be levyed in the Court of the King: This ſhall be intended, and expounded, if no fine is lawfully levyed in the Kings Court: And therefore a Fine levyed by the Husband alone, is not within Co. Litt. 381. b. Plowd. Com. 246. b. Wyllion v. Sign. Berkeley.

within the meaning of the Statute of *Gloceſter*, for that Fine ſhould work a wrong to the Wife, but a Fine levyed by the Husband and Wife is intended by the Statute, for that Fine is lawfull, and worketh no wrong.

Co. Litt. 381. *b.* So the Star. of *Weſtm.* 2. *c.* 5. ſaith (*Ita quod Epiſcopus Eccleſiam conferat*) is conſtrued, *Ita quod Epiſcopus Eccleſiam legitimè conferat*, and the like in a number of other Caſes in our Books.

With our Law do's concurre in this point Roman Law.

D. 1. 3 19. de Legibus ambiguis. *In ambigua voce Legis ea potius accipienda eſt ſignificatio, quæ vitio caret, præſertim cùm etiam voluntas Legis ex hoc colligi poteſt.*

Rule 3. It is a Rule, *That in Statutes, although particulars be enumerated, yet it excludes not, but that whatſoever is within the ſame Reaſon, and Equity, ſhall be taken to be within the Statute:* And the Reaſon hereof is, For that the Law-maker could not poſſibly ſet down all Caſes in expreſs Terms: As for Example:

Cro. 3 *part. James* v. *Tutney.* 533. The Star. of *Weſtm.* 2. *de donis*, expreſſeth divers kinds, yet other gifts not mentioned, are within the ſaid Statute.

So

So the Stat. of 27 *H.* 8. of Joyntures, enumerates divers particular Eſtates which are Joyntures, yet other Eſtates, not mentioned, are within the ſame Reaſon, and therefore within the Statute.

So the Statute, which ordains, That in an Action of Debt againſt Executors, he that doth appear by Diſtreſs ſhall anſwer, doth extend by Equity to Adminiſtrators; for ſuch of them as doth appear firſt by diſtreſs, ſhall anſwer by Equity of the ſaid Act, becauſe they are of the like kind.

So the Statute of *Bigamy*, and the Stat. of 23 *H.* 8. of *Coſts*, be expounded larger than the words; for in the expoſition of Statutes, when the words make proviſion for certain perſons, yet they ſhall be extended by Equity unto others.

As in our Law, when the words of a Stat. enact one thing, they enact all other things that are of like degree; So 'tis in the Civil Law:

Non poſſunt omnes Articuli ſigillatim, aut Legibus, aut Senatusconſultis comprehendi: ſed cum in aliqua Cauſa ſententia eorum manifeſta eſt, is qui Juriſdictioni præeſt, ad ſimilia procedere, atque ita jus dicere debet. D. 1 3 2.

Rule 4. *The Rehearſal, or Preamble of a Statute is a good mean to finde out the meaning of a Statute, and as it were a Key to open the underſtanding thereof.*

Co. Litt. 79. a.

The firſt part or beginning of an Act, ſayes one, is called the *Preamble* of the Act, which Preamble is a Key to open the mindes of the Makers of the Act, and the miſchiefs which they intend to remedy by the ſame: As for Example, The Stat. made at *Weſtm.* the firſt *c.* 37. which giveth an Attaint, the Preamble of which is thus: *Foraſmuch as certain peop'e of the Realm doubt very little, to give falſe Verdicts, or Oaths, which they ought not to doe, whereby many people are diſherited, and loſe their Right, it is provided,* &c.

Rule 5. *Where a Statute begins with particular words of an Inferiour nature, and concludes with general words, the general words ſhall never be extended to any thing of a Higher nature.* And therefore Biſhops are not included within the Statute of 13 *Eliz. cap.* 10. for the Stat. doth begin with *Colledges, Deans, and Chapters, Parſons, Vicars*; and concludes with theſe words,

and

and other having Spiritual Promotion; which last words do not include Bishops; for Bishops are of a Higher nature. *Vid. Co.* 2. *Inst.* 457.

So in the Stat. of *Westm.* 2d. *c.* 41. the words are, *Statuit Rex, quod si Abbates, Priores, Custodes Hospitalium, & aliarum domorum Religiosarum, &c.* These last words do not extend to the Bishops as is held: *Dyer* 1 & 2 *Ph. & Mar. f.* 109. *Vi. plus Co.* 2. *Inst. f.* 186. & 137. on *Marleb. cap.* 19. *c.* 28. & *West.* 1. *c.* 3, & 15.

It is a Rule, *That Statutes of Expla-* Rule 6. *nation must be Construed only according to the words, and not with any Equity, or Intendment.* As a Case out of the *Court of Wards* for Example:

All the Justices and Barons being assembled, this Case was propounded, *viz.* Two Joynt-Tenants to them, and their Heirs; the one of them makes a Conveyance, to the use of himself, and his Wife for a Joynture, and the advancement of his Son; whether this be an Assurance within the Statutes of 32, & 34 *H.* 8. so as the King shall have a Third part. Sir *Randolph Crew*, the Chief-Justice, and the Chief-Baron, were di- *Co.* 3 *part. f.* 33.

vided in their Opinions from the other Juſtices, and Barons, in this point, who all, upon that ſuddain Motion, conceived it to be out of the Statutes: For the words are, *If any Sole ſeiſed, or ſeiſed joyntly with others, &c.* there in ſuch Caſes the Statute provideth, That the King ſhall have the third part upon ſuch Conveyance; but where two are joyntly ſeiſed to them, and their Heirs, and the one makes a Conveyance, this is out of the words of the Statute of 32 *H.* 8. and therefore it ought not to be within the Intent of 34 *H.* 8. for that is a Statute of Explanation, and ſhall be conſtrued only according to the words and not with any Equity, or Intendment: For there cannot be an Explanation upon an Explanation.

Rule 7. It is a Rule, *That Statutes in Affirmative ſhall not alter a precedent power, or Intereſt*, ſecus *in the Negative*. Or,

Vid. Co. l. 5. f. 5, 6. of the Kings Eccleſiaſtical Law.

A Statute in the Affirmative without any Negative expreſſed, or implyed, doth not take away the Common Law, or a Cuſtom particular. As for Example:

Error of Judgement *in Ejectione firmæ* in the County of *Denbigh*, before the Juſtices

Juſtices there, and the Error was apparent; for the Writ did bear date 16 *Apr.* 28 *Eliz.* and the Ejectment was ſuppoſed 27 *Apr.* 28 *Eliz.* and ſo cannot be defended; but *Winter* ſaid, that by the Stat. of 38 *H.* 8. Judgments given in Perſonal Actions in *Wales* ſhall be reverſed there, and this is a perſonall Action. *Egerton* Sollicitor *contrà*; for this Action doth ſound in the Realty, and the Stat. did not intend that Titles ſhould come in Queſtion before the Councill of the *Marches*, and the Stat. is in the Affirmative, and therefore doth not take away the Power at the Common Law; and although he may ſue there by the Statute, yet he may ſue here, in the Q. Bench, if he will, as he might before; and afterwards it was adjudged, that this Court had Juriſdiction, and the Judgement was reverſed. *Cro.* 1 *part.* Griffith *v.* Apprice. *f.* 104.

So in an information upon the Stat. of 8 *E.* 4. for giving Licenſes; upon *Not-guilty* it was found for the Queen. And it was moved, that the Action lies not in this Court; for the Statute appoints it to be ſued in certain particular Courts therein mentioned, and there is no word of the *Exchequer*: *Atkinſon contrà*, The Statute is in the Affirmative, and not in *Cro.* 1 *part.* Agard *v.* Candiſh. *f.* 326.

the Negative, That it ſhall not be ſued elſewhere: And to this the Barons agreed, for this is a Superiour Court, though not named, and ſo Suite may be here, for there are no reſtrictive words in the Statute, and this Court hath power to hold Plea in any thing concerning the Queen, if not reſtrained.

Cro. 1 part. Pratt v. Stock, 315.

So Adminiſtration and Probate of Wills, was by the Common Law, which any might doe, and the Stat. of 37 *H.* 8. *c.* 17. is in the Affirmative, that Doctors of the Civil Law, may be Commiſſioners, though they are married, but it is not Reſtrictive, that no other may be Commiſſioners, and therefore taketh not away the Liberty at the Common Law.

Co. Litt. 115. a.

So an Affirmative Act doth not take away a Cuſtom, as the Statutes of Wills of 32 & 34 *H.* 8. do not take away a Cuſtom to devize Lands, as it hath been often adjudged.

Rule 8.

It is a Rule, *That Affirmatives in Statutes that introduce new Laws, do imply a Negative of all that is not in the Purview.*

And therefore in *Amy Townſends* Caſe *Plowd. f.* 111. it is adjudged, that where one comes to a poſſeſſion, by an uſe out

of

of a State discontinued, so that the Entry was not lawfull to the Cestuy que use, such a Possession works no *Remitter*, because the Statute appoints the possession in the same manner and form (which imports a Negative, and no other) as are in use.

So the Stat. of *Westm.* 2. *c.* 3. appoints, that the Demandant in a *Quod ei deforceat*, may vouch *ac si esset Tenens*; if in the first Action he could not vouch, as if it were a *Scire facias*, then cannot he vouch in the *Quod ei deforceat*, being Demandant. 14 *H.* 7. 18. *b.*

When an Act of Parliament is made, that disableth any Person, or maketh any thing voyd, or Tortious for the good of the Church, or Common-wealth, in this Law all the Subjects have an Interest, and the King cannot dispense therewith, no more than with the Common Law; but where a Statute prohibiteth any thing upon a Penalty, and giveth the Penalty to the King, or to the King, and Informer, there the King may dispense with the Penalty. Rule 9.

In a *Quare Impedit*, in the Kings Bench, by the King against the Bishop of *Norwich*, and one *Sacre* Incumbent; It was resolved by the Court, that if an Incumbent

were guilty of Simony in obtaining a Benefice, that he was made incapable of that Benefice for ever, by the words of the Statute of 31 *Eliz.* which are largely to be expounded. And the Case of Sir *Arthur Ingram* was thereupon remembred, who having bought the Office of Cofferer, being Office handling the Kings Treasure, was holden by *Egerton* Lord Chancellor, and *Coke* Chief-Justice, not only removeable for the present, but also for ever uncapable of that Office, by force of the Statute of 5 *E.* 6. though he had a *Non Obstante*; for the person being disabled by the Statute, could not be inabled by the King.

Hob. Rep. Roy *v.* Bp. of *Norwich*, *f.* 75.

Vid. plus Co. Litt. f. 120. a. & 234. a. *Co.* 3. *Inst. f.* 134.

Rule 10. It is a Rule, *That if a Statute have words prohibitory as well as a Penalty annexed, a Prohibition will lye*, secus *if it have only a Penalty.* And therefore a Prohibition lyes upon the Stat. of 23 *H.* 8. *c.* 9. (concerning *Citations out of the Diocesse*) becaus it hath words prohibitory as well as a Penalty annexed, for breaking the Prohibition: Otherwise it had been, if the Penning had been thus only: *If*

Hob. Rep. Jones *v.* Jones. *f.* 187.

any

any man cite another out of his Dioceſſe, he ſhall forfeit ten pounds.

A Statute prohibiting a thing, and no Penalty limited, the Offender may be indicted for a Contempt againſt that Statute. Rule 11.

As for Example:

One *Crouther* was indicted, For that a Burglary was committed in the Night by perſons unknown, and *J. S.* gave thereof Notice unto him, being then Conſtable, and required him to make *Hue and Cry*, and refuſed, *&c.* Exception was taken to the matter of the Indictment; Becauſe he hath been adjudged, That an Hundred ſhall not be charged with a Robbery, committed in the Night, becauſe they be not bound to give attendance; No more ought a Conſtable to do it in the Night: But all the Court held the Endictment to be good notwithſtanding: For it is not like the Caſe of an Hundred; becauſe it is the Conſtables Duty, upon Notice given unto him, preſently to purſue. And it was ſaid, That in every Caſe where a Statute prohibits any thing, and doth not limit a Penalty, the party offending therein may be indicted, as for a Contempt againſt that Statute. *Cro.* 1 *part.* Crouthers caſe.

It

Rule 12. It is a Rule, *When a Statute appoints a Penalty, and how it ſhall be recovered, it ſhall not be by Indictment.* As for Example:

Cro. 2 part. Caſtles caſe.

One *Innocent Caſtle* was indicted, For that he took upon him, to be a Juſtice of Peace within the County of *Buckingham*, not having Lands to the value of 40 *l. per annum*, and ſent his Warrant to have one before him, to finde Sureties for the Peace, *&c.* Exception was taken to this Indictment: That the Statute appoints a Penalty, *&c.* which is to be recovered by Bill, Plaint, or Information, *&c.* therefore not by Indictment; and it was no Offence before. And of this Opinion was the Court, That when a Statute appoints a Penalty for the doing of a thing, which was no offence before, and appoints how it ſhall be recovered, it ſhall be puniſhed by that means, and not by Indictment.

Rule 13. *Ubi Lex eſt ſpecialis, & ratio ejus generalis, generaliter accipienda eſt.*

As in the Statute of *Merton c.* 3. the Juſtices *in Eyre* are named, but for Example, and becauſe *Aſſiſes* were taken

moſt

moſt commonly before them; for though the Aſſize be taken in the Kings Bench, or Court of Common Pleas, or before Juſtices of Aſſize, yet it is within the Statute, for though the words be ſpecial, yet the Reaſon of the Law is generall; *Et quando Lex ſpecialis, Ratio autem generalis, generaliter Lex eſt intelligenda.* *Co. 2. Inſt. f. 83.*

With our Law do the Civilians concurre in this point:

Si præfatio Legis ſit generalis, licet Lex ſit ſpecialis, generaliter intelligitur. Doctores.

Si Lex eſt ſpecialis, Ratio tamen eſt generalis, generaliter Lex eſt intelligenda. Bartolus.

Generaliter dictum, generaliter ſapit. As for Example: Rule 14.

In the Statute of *Merton c.* 2. are theſe words, *Item omnes Viduæ*, &c. *Qui omne dicit, nihil excludit. Generale dictum, generaliter eſt intelligendum.* And therefore where there are Five kinds of Dowers, viz. *Dower at Common Law*, *Dower by the Cuſtom*, *Dower ad Oſtium Eccleſiæ*, *Dower ex aſſenſu Patris*, and *Dower de la pluis beale*; This Chapter doth extend to them all. *Co. 2 Inſt. f. 81.*

So the Stat. of 1 *H.* 7. *c.* 1. is generall, and extends to all perſons of what Eſtate

Eſtate, or degree ſoever, and as well to women, as to men: For the words be *(If any Perſon)* And *Generalia Verba ſunt generaliter intelligenda.*

Co. 3. Inſt. f. 76.

Such is the conſtruction of the Civilians: *Generaliter, & ſine diſtinctione prolata, generaliter & ſine diſtinctione accipiuntur.*

Accurſius.

Generalia generaliter intelligenda ſunt.

Gothofredus.

Rule 15. *Acts of Parliament are to be ſo conſtrued, as no man that is innocent, or free from Injury, or Wrong, be by a Literal Conſtruction puniſhed, or endamaged; Or,*

Co. Litt. 11. b. & 360. a.

Such Interpretation muſt ever be made of all Statutes, that the Innocent, or he in whom there is no default, may not be damnified.

And therefore, albeit the Letter of the Stat. of *Gloceſt. c.* 1. is generally to give Damages againſt him that is found Tenant of the Land, and the Caſe that is put by *Littleton* Sect. 685. wherein *D.* being Survivor, is conſequently found Tenant of the Land, yet becauſe he waved the Eſtate, and never agreed to the Feoffment, nor took any profits, he ſhall not be charged with the Damages.

It

It is a Rule, *That when an Act of Repeal is repealed, the first Act repealed, is revived.* Vid. *Co.* 4. *Inst.* f. 325. *Co.* lib. 12. f. 7. *Co.* 2. *Inst.* f. 685. Rule 16.

Whensoever Felony is made by any Statute, and the Benefit of Clergy is not expressly taken away, the Offendor shall have his Clergy. Rule 17.

When any Offence is Felony either by the Common Law, or by Statute, all Accessories both before and after, are incidently included. Rule 18.

As the Act of 8 *H.* 6. *c.* 12. concerning Stealing of Records doth extend expresly to Accessories before, and leaveth Accessories after to the Construction of the Law, yet may there be Accessories after the Fact: For whensoever an Offence is made Felony by Act of Parliament, there shall be Accessories to it both before and after, as if it had been a Felony by the Common Law, and therefore though this Act expresseth Accessories before, yet it taketh not away Accessories after, but leaveth them to the Law. *Co.* 3. *Inst.* fol. 72, & 73.

Felonies,

Rule 19. *Felonies, or other Capital Crimes shall not be made, or created by doubtfull words in a Statute.*

Co. 4. Inſt. f. 66. Hob. Rep. f. 170. Courtenays caſe. And therefore forfeiture of the Body, ſhall be underſtood the loſs of Liberty, and uſe of a mans Body by Impriſonment, and ſhall not extend to Life.

Rule 20. *Statutes Penal, and Suits upon them, muſt be by Original, or Information, and not by Playnt.*

Cro. 1 part. Gadley v. White col. 544. Error of a Judgement in *Ludlow*; For that the Plaintiff was ſued there in Debt upon the Stat. of 5 *Eliz.* for uſing a Trade, not being an Apprentice to that Occupation, and there recovered. The Error aſſigned was, Becauſe it is enacted by the Stat. of 18 *Eliz.* That Suits upon Penal Statutes ſhall be by Original, or Information; and it is here by Plaint. And it was therefore reverſed.

Rule 21. *Statutes are always ſo to be expounded, that there ſhould be no failure of Juſtice, but rather than that ſhould fall out; that Caſe by Conſtruction ſhould be excepted out of the Statute, whether the Statute be in the Negative, or Affirmative.*

Co. 2. Inſt. f. 23.

General

General Words, where the King is not named, ſhall never binde, or barre him. As for Example: Rule 22.

One *Aſcough* ſeized in Fee of the Mannor of *D.* holden by Knight-Service *in Capite*, deviſeth the ſaid Mannor, to be ſold by his Executors, *&c.* The Queſtion was, Whether this were a good Devize to binde the King, and to barre him of his *Primer Seizin*, by the Stat. of 43 *Eliz. Of Charitable uſes?* And all the Juſtices held clearly, This ſhall not barre the King for his Intereſt of Wardſhip, Livery, or *Primer Seizin*, becauſe general words, where the King is not named, ſhall never binde, or barre him. *Cro.* 3 *p rt.* Aſcoughs caſe, *f.* 525.

So the Statute of *Weſtm.* 2^d. *c.* 5. which gives the Plea of *Plenarty* by Six months, doth not binde the King, becauſe the Act is general, and the King is not named. *Com. Sign.* Barkleyes caſe.

So, by the Statute of *Magna, c.* 11. it is provided in the Negative, That *Communia Placita non ſequuntur Curiam noſtram, ſed teneantur in Certo aliquo Loco*, but this doth not binde the King: For he may have a *Quare Impedit* in the Kings Bench, Becauſe the King is not bound, unleſs he be particularly named.

Statutes,

Rule 23. *Statutes that are enacted, to eaſe the King of Trouble, and Labour, do not bereave him of Power.*

As 4 *Eliz. Dyer* 211. The Commiſſion of Tryall of Pyracy, upon the Stat. of 28 *H.* 8. *c.* 13. is good, though the Chancellour do not nominate the Commiſſioners as that Stat. appoints.

So *Mich.* 5 & 6 *Eliz. Dyer*, *f.* 225. b. The Queen made Sheriffs by the Judges, notwithſtanding the Statute of 9 *E.* 2.

So *Mich.* 13 & 14 *Eliz. Dyer*, *f.* 303. b. The Office of *Alnage* granted by the Queen, without the Bill of the Treaſurer, it is good with a *Non Obſtante* againſt the Statute of 31 *H.* 6. *c.* 5. For theſe Statutes and the like were made to put things in ordinary Form, and to eaſe the Soveraign of Labour, but not to deprive him of Power.

Thus much of the *Written Laws*, commonly called Statutes, or Acts of Parliament. I proceed according to my propoſed Method to the *Laws Unwritten*, which our Lawyers tearm Cuſtoms.

II. *Of*

II. *Of the Laws* Unwritten, *commonly called* Customs.

A *Custom*, that hath acquired the force of a Law, is always said to be *Jus non scriptum*; for it cannot be made or created, either by Charter, or by Parliament, which are Acts reduced to writing, and are always matter of Record; but being only matter of Fact, and consisting in Use and Practise, it can be recorded, and registred no where, but in the Memory of the People.

For a Custom taketh beginning, and groweth to perfection in this manner: When a Reasonable Act once done, is found to be good, and beneficial to the People, and agreeable to their Nature and Disposition; then do they use it, and practise it, again and again, and so by often Iteration and Multiplication of the Act, it becometh a Custome, and being continued without interruption time out of mind, it obtaineth the force of a Law. And so the Rule 44 *E.* 3. 19. holds true, That no Law obliges the People but that

which is made by the Consent of the People: *Quod omnes similiter tangit, ab omnibus comprobetur. Cod.* 5. 59. 5.

Co. Litt. f. 116. *b.* Now Custom is either *General* or *Particular*: General is that which is currant through *England*, and is called the *Common Law*, which is nothing else but the common Custom of the Realm. And as those general Usages or Customs, which are generally observed, are called the *Common Law*; so there are almost infinite particular Usages, Prescriptions, and Customs in several parts of this Nation, which are observed as Laws by the Inhabitants of those places, and to all Intents, and Purposes have the Effects of Laws. *Habent Anglici*, sayes *Bracton*, *plurima ex Consuetudine, quæ non habent ex Lege, sicut in diversis Comitatibus, Civitatibus, Burgis, & Villis, ubi semper quærendum erit, quæ sit illius Loci Consuetudo, & qualiter utantur Consuetudine, qui Consuetudines allegant.* Lib. 1. c. 1. nu. 2.

Thus farre of the Definition, or nature of a Custom, and likewise its division, *viz.* Into General and Particular, I now shall treat of each severally and apart.

It

It is to be known, that the Common Law is taken Two wayes:

1. *Largely.*
2. *Strictly.*

1. Of *Cuſtoms general* ſtyled the *Common Law.*

The Common Law *largely* taken, is the allowance and approbation of the Grounds and Cuſtoms of another Law. As for Inſtance; It is ſaid in our Books, 9 *E.* 4. 19 *H.*6. 2. 1 *E.*4. and divers other Books, That ſuch and ſuch ſhall not have their Clergy, by the Common Law, as you may read at large, *Stamford. Pl. Coron. Lib.* 2. *c.* 42. And yet *cap.* 41. that Clergy was an antient Priviledge of *Holy Church*, and has his beginning by the Canon Law, and not by the Common Law, ſaith *Stamford.*

The Common Law, *ſtrictly* taken, are thoſe antient Grounds, and Maxims of Law, which, agreeing with the Fundamental Law of Reaſon, have no Controller but the High Court of Parliament; and if the Common (*ſtrictly* taken) be not abrogated, or altered by Parliament, it remains ſtill: It appeareth in the Statute of *Magna Charta*, and other ancient Statutes (which for the moſt part, are Affirmations of the Common Law) in the Original

Co. Litt. 115. *b.*

ginal Writs, in Judicial Records, and in our Books of Terms and Years.

That we may the better apprehend this our Common Law, I ſhall ſhew you its *Antiquity*, its ſeveral *Appellations*, its *Aptitude* for the Government of this Nation, its *Prehominence* and Prelation as to the Laws of this Realm; and laſtly give you ſome of the *Grounds* of the Common Law.

1. *Of its Antiquity.*

THat our *Common Law* was not brought in by the Conquerour, is moſt evident out of *Coke*, *Forteſcue*, and the Author in his Notes on *Forteſcue*.

1. *Coke.*

In his Proeme of 8. part of his Reports, it is ſaid, that the Conquerour ſwore to obſerve the good, approved, and ancient Laws of this Kingdom: and that the ſubjects might the better obſerve their duty, and the Conquerours Oath, he cauſed Twelve the moſt diſcreet, and wiſe-men in every Shire throughout all *England*, to be ſworn before himſelf, that without ſwerving *ad dextram*, or *ad ſiniſtram*, they ſhould declare the Integrity of their Laws, without

without concealing, adding, or any ſort varying from the Truth; and *Aldreb* the Archbiſhop that crowned him, and *Hugh* the Biſhop of *London*, by the Kings Commandment wrote that which the Jurates delivered, and theſe by publick Proclamation he declared to be Authentique, and under grievous puniſhment to be obſerved.

In the Proemes to his Third, and Sixth Report *Coke* proves, that our Common Law in theſe particulars was before the Conqueſt.

1. That the Queen, being a wife to the King Regent, was a Perſon Sole by the Common Law, to ſue, and be ſued, to give, and take, *&c.* ſolely without the King.

2. That a man ſeiſed in Fee Simple, ſhall forfeit his Lands and Goods by Attainder of Felony, by Outlawry, and that thereby his Heirs ſhould be diſherited.

3. That a Woman being attainted of Petit Treaſon ſhould be burnt.

4. That time out of minde there have been Tryals, by the Oath of 12 men:

5. That time out of minde before the Conqueſt there had been Sheriffs.

2. *Forteſcue.*

Cap. 17. *de Laudibus Legum Angliæ.*

He tells us, That the Cuſtoms of *England* are of moſt antient Antiquity, practiſed, and received of Five ſeveral Nations from one to another by Succeſſion, *viz.* the *Brittans*, the *Romans*, the *Saxons*, the *Danes*, and the *Normans*.

3. The Author of the Notes on *Forteſcue*:

It is, ſayes he, the Trivial Demand of thoſe that have no good will to our Common Law, *When and how began your Laws?* Queſtionleſs it is fitteſt anſwered by affirming, when, and in like kind as the Laws of all other States, that is, when there was firſt a State in that Land, which the Common Law now governs; then were natural Laws limited for the conveniency of Civil Society here, and thoſe Limitations have been from thence increaſed, altered, interpreted, and brought to what now they are; although perhaps (ſaving the meerly immutable part of Nature) now, in Regard of their firſt being, they are not otherwiſe than a Ship, that by often mending, had no piece of the firſt materials, or as the Houſe that is ſo often repaired, *ut nihil ex priſtina materia ſuperſit*, which yet (by the Civil Law) is to be accounted

counted the ſame ſtill. Little therefore follows in point of Honour, or Excellency eſpecially to be attributed to the Laws of a Nation in generall, by an argument thus drawn from difference of Antiquity, which in ſubſtance is alike in all.

Theſe Authors that I have here cited, may ſufficiently convince thoſe, that would ſay ſomething againſt the Laws of *England* if they could, as to the point of Antiquity.

2. *Of the ſeveral Appellations of the Common Law.*

THe ſeveral names, whereby the Common Law of *England* is called, appear in *Cokes* Commentary on *Littleton*, *f.* 142. *a.* The Common Law, ſays he, is ſometime called *Right*, as in the Grand Charter, *Nulli vendemus, nulli negabimus, aut differemus Rectum*, and ſo in the Mirror it is called *Droit*, as *Droit defend*, the Law defendeth: Sometime it is called *Juſtice*, and all the Commiſſions and Charters for the Execution of Juſtice are, *Facturi, quod ad Juſtitiam pertinet, ſecundum Legem & conſuetudinem Angliæ*: Sometime it is called the *Common Right*, as in

the Stat. of *Weſtm.* I. *c.* I. ſo called, becauſe the *Common Law* is the beſt, and moſt common Birth-Right, that the Subject hath, for ſafe-guard and Defence, not only of Goods, Lands and Revenues, but of his Wife, and Children, his Body, Fame, and Life alſo.

3. *Of its Aptitude, and Self-ſufficiency for the Government of this Nation.*

IT is worthy of Obſervation, ſayes *Coke*, how the Laws of *England* are not derived from any foreign Law, either *Canon*, *Civil*, or other, but a ſpecial Law appropriated to this Kingdom, and moſt accommodate, and apt for the Government thereof, under which it hath wonderfully flouriſhed, when this Law hath been put in due Execution, and therefore as by Scituation, ſo by Law it is truly ſaid,

Et penitus toto diviſos Orbe Britannos.

Our Native *Common Law*, ſayes another, is farre more apt, and agreeable, than the *Civil* or *Canon Law*, or any other written Law in the world beſides; howſoever, ſome of our Countreymen, who are *Cives*

in

In Aliena Republicâ, & Hoſpites in ſua, may perhaps affirm the contrary. But certain it is, That the great, and Wiſemen of *England* in the Parliament of *Merton* did not preferre a Foreign Law, before their own, when Motion being made by the Clergy, That Children born before marriage might be adjudged Legitimate: They all made anſwer with one voyce, *Nolumus Leges Angliæ mutari.*

Merton, c. 9.

Co. Litt. 245. *a.*

Co. 2. *Inſt.* *f.* 98.

And again in 11 *R.* 2. when a new courſe of proceeding in Criminal Cauſes, according to the form of the Civil Law was propounded in that unruly Parliament, Anſwer was made by all the Eſtates, *That the Realm of England neither had been in former times, nor hereafter ſhould be ruled, and governed by the Civil Law, Rot. Parliam.* 11 *R.* 2. *in Archiv. Turris.* And good reaſon for it, becauſe our Common Law is ſo framed, and fitted to the Nature and Diſpoſition of this People, as we may properly ſay, it is Connatural to the Nation, ſo as it cannot poſſibly be Ruled by any other Law: This our Common Law doth demonſtrate the ſtrength of Wit, and Reaſon, and ſelf-ſufficiency, which have made their own Laws out of their Wiſdom, and Experience, not begging, or borrowing a form

Davys Reports, Le Caſe de commendam, *f.* 70. *b.*

form of a Common-weal, either from *Rome* or from *Greece*, as all other Nations of *Europe* have done, but having sufficient provision of Law, and Justice within the Land, have no need, *Justitiam & Judicium ab Alienigenis emendicare*, as King *John* wrote most nobly to Pope *Innocent* the Third. Thus much for the Commendation of the Common Law in point of *Aptitude*, and self-sufficiency for the Government of this Nation.

4. *Of the Preheminence, and Prelation of the Common-Law, as to other Laws used in this Realm.*

THat all other Laws used in this Realm are to give place to the *Common Law*, take these following particulars.

1. When the Common-Law, and Statute-Law concurre, the Common Law shall be preferred; And therefore if *J.S.* by Deed indented, bargain and sell a Reversion to *J. N.* and his Heirs, and before Inrollment doth levy a Fine to *J. N.* and his Heirs, and after the Deed is inrolled within six months, It is resolved, That the Conusee shall be in by the Fine, and not by the Indenture inrolled.

Co lib. 4. Hindes Case.

So

So if Ceſtuy que uſe, and his Feoffees had joyned in a Feoffment, after the Stat. of 1 *R.* 3. *c.* 1. it had been the Feoffment of the Feoffees, and the Confirmation of Ceſtuy que uſe; For the Eſtate at the Common Law ſhall be preferred. *Co. Litt.* 49. *a.*

2. When the *Common Law*, and the *Law Maritime* concurre, the Common Law muſt have the Prelation: As in the Caſe betwixt *Palmer* and *Pope*, it was ſuggeſted, that the Charter-party was made in the Port of *Gado*, upon the Continent of *Barbary*, whereupon the Court reſolved, that a Prohibition lay, becauſe the Original Contract, though it were made at Sea, yet was changed, when it was put in Writing Sealed, which being at Land, changed the Juriſdiction as to that poynt, but if it had been a Writing without Seal, it had made no change; now if the Contract were at Land, though the Breach be at Sea, which are two ſeveral Acts, yet becauſe theſe two muſt concurre to make Cauſe of the Suit, which is intire, the Party ſhall be forced to ſue in the Kings Court, becauſe that, and the Common Law muſt prevail againſt other Courts, and Laws. *Hob. Reports*, fol. 212.

3. When the Common Law, and the Eccleſiaſti-

Eccleſiaſtical Law do meet, as to the Deciſion of the Queſtion, it ſhall be determined according to the Rules of the Common Law, if the Determination of the Canon, or Eccleſiaſtical be contrary to the Common Law: As for Example:

Cro. 2 part. Hutchins *v.* Glover, *f.* 463.

A man deviſeth ten Pounds to *J. S.* to be paid at his full age, and he ſues for it, when he cometh to the Age of 21. years; Although by the Eccleſiaſtical Law full Age is at 25 years, yet the Eccleſiaſtical Court ought to adjudge after our Law.

Co. Litt. 125 *b.*

4. When a matter alledged, extendeth into a place at the Common Law, and a place within a Franchiſe, it ſhall be tryed at the Common Law. And therefore upon Treſpaſs brought for Beaſts in the County of *Northumberland*, and driven, or enchaſed to *N.* which was in the Biſhoprick of *Durham*, and this was pleaded, yet the Defendant was forced to anſwer, and the Reaſon is, becauſe *Communis Lex eſt magis digna.*

2 H. 4. 25.

5. Where the Common Law, and a private Cuſtom do meet together, there the Common Law ſhall be preferred; As if an Action of Debt be brought joyntly againſt two, where one of them only hath Cauſe of Priviledge, his Priviledge

9 E. 4. 4. *b.*

ledge ſhall not be allowed unto him. Thus much of the ſeveral *Appellations*, of the *Antiquity*, of the *Aptitude* or *ſelf-ſufficiency*, and the *Prelation* of the *Common Law* of *England*.

I now come to propoſe ſome Grounds, or Caſes, relating to the Common Law, as well in Reſpect of the King, called *Prerogative Law*, as of his Loving Lieges, or Subjects; for the Kings Prerogatives are time out of minde, and are reckoned part of the Common Law: And therefore it is well ſaid, *That a Prerogative cannot begin at this day.* 13 H. 7. 11. b.

As for the word (*Prærogativa*) you muſt know, that it is derived of *Præ.* i. e. *Ante*, and *Rogare*, that is, to aſk, or demand before-hand, whereof cometh *Prærogativa*, and is denominated of the moſt excellent part, becauſe though an Act of Parliament hath paſſed both the Houſes of the Lords, and Commons in Parliament, yet before it be a Law, the Royal Aſſent muſt be asked, or demanded, and obtained, and this is the proper ſenſe of the word: But legally extends to all Powers, Preheminences, and Priviledges, that the Common Law giveth to the King. Co. Litt. 90. b.

It

1. Examples of the *Common Law*, relating to the King.

It is a Prerogative, or old Custom of the Realm, that no man may disseise the King, nor pull any Reversion or Remainder out of him. 4 *H.* 7. 1. *b.* 1 *H.* 7. 19. *a.* *Co. Lil.* 6. *Greens* Case.

It is a Prerogative attributed to the King, for the excellency of his Person, that no Freehold may be given to, ne be derived from him, but by matter of Record. 21 *H.* 7. 21. *b.* 7 *E.* 4. 17. 14 *E.* 4. 2. *Plowd. Com. Walsinghams* Case, 553. *a.* *Duchy de Lancaster*, 213. *b.* *Nicholls* v. *Nicholls*, *f.* 484. *b.*

It is a Prerogative of the King, that no time after the Law runneth to the King. *Mirror c.* 3. *Co. Lib.* 6. *Boswells* Case, 49. *a.* *Co.* 1. *Inst. f.* 294. *a.*

It is a Prerogative, that when two Titles have their Commencement, at one and the same time, the King shall have the preheminence. *Co. Lib.* 9. *Quickes Case. Lib.* 4. *Le Case des Wardens*, *f.* 55. *a.* *Co.* 1. *Inst. f.* 30. *b.* *Plowd. Com. Hales* Case.

It is a Prerogative at the Common Law, That such goods, whereof no Person can claim Property, belong to the King, as Wrecks, Strayes, *&c.* *Co.* 3. *Inst. f.* 132. *Bracton*,

Bracton, Lib. 2. *c.* 24. *Fleta, Lib.* 1. *c.* 43. 8 *H.* 4. 2. *b.*

It is a Prerogative appertaining to the Imperial Crown, that he may grant a thing in Action. 2 *H.* 7. 10. *a.*

It is a Prerogative of the King, that he may chooſe his Action, and ſue in what Court he pleaſeth. 12 *H.* 7. 21. *b.* 14 *H.* 7. 28. *b.*

It's a Prerogative, that the Kings Grant ſhall not enure to a double Intent. *Co. Lib.* 1. *Alton Woods* Caſe, *f.* 52. *a.*

It is a Prerogative, or old Cuſtom of the Realm, that if the King has a Rent-charge, he may diſtrein for it in all the Lands of the Tenant, of whomſoever the ſame be holden; And this Prerogative holdeth not only in caſe of Rent charge, but in caſe of Rent-ſervice. 13 *E.* 4. 6. *b. Co.* 4. *Inſt.* 119.

It is a Prerogative of the Crown, that the King can make a Leaſe, to commence from a day paſſed, and no common Perſon can do ſo. 32 *H.* 6. 7.

It is a Prerogative at the Common Law, that if the King bring an Action, and one of the parties die, his Writ ſhall not abate. 18. *E.* 3. *Scire facias.* 10. *Cro.* 2. part. *Dominus Rex & Parker* v. *Webb, f.* 481.

It

It is a Prerogative of the Crown: If an Information be exhibited in the Exchequer by a Common perſon for the King, and the Defendant pleads in Barre, and traverſeth the Information; the King may traverſe the matter of the Barre, if he pleaſe, and is not bound to maintain the matter in the *Abſque hoc*, &c. *Cro. 2 part. f.* 481. *Dominus Rex & Parker v. Webbe.* 30 *H.* 6. 2. 12 *H.* 7. 12. 11 *H.* 7. 1.

It is a Prerogative of the King of *England*, To have Execution of Body, Lands, and Goods, not communicated to the Subject, but in Caſe of a *Statute Merchant*, and *Staple*, and Recognizances of that nature, which is by the Statute-Law. *Co.* 2. *Inſt. fol.* 19. *Hob. Rep. f.* 60. *Foſter v. Jackſon.*

It is a Prerogative of the Soveraign of this Realm, that he ſhall be Sole Founder, though another joyn in the Foundation. *Co.* 2. *Inſt. f.* 68.

It is a Prerogative by the Common Law, that if a man hold Land of the King by Knight-Service *in Capite*, and other Lands of other Lords, and dieth, his Heir within Age, the King ſhall have the Wardſhip of the Lands. *Co. Litt.* 77. *a.*

It

It is a Prerogative of the King, that if he make a Leaſe for years, reſerving a certain Rent with a Clauſe of Re-entry, if the Rent be arrear, the King may enter without any demand. 2 *H.* 7. 9. *b. Co. Litt.* 201. *b. Cro.* 1. *part.* Burrough *v.* Taylor. *Co. Lib.* 4. Boroughs *Caſe.* Theſe, and infinite others (which I omit for the ſake of Brevity) are the Prerogatives, that the Kings of *England* have enjoyed according to the courſe of the Common Law.

2. Examples of *General Cuſtoms*, or the *Common Law*, relating to the Subject.

By the old Cuſtom of the Realm, Inheritance may lineally deſcend, but not aſcend from the Son to the Father, or Mother, nor to any Anceſtor in the Right Line. *Litt. Sect.* 3.

By the old Cuſtom of the Realm, None ſhall inherit any Lands as Heir, but only the blood of the firſt Purchaſor; and therefore whenſoever Lands deſcend from the part of the Mother, the Heirs of the part of the Father ſhall never inherit: And likewiſe when Lands deſcend from the part of the Father, the Heirs of the Mother ſhall never inherit. *Co. Litt. f.* 13. *a.*

By the Cuſtom of the Realm, No man

can be Heir to a Fee Simple, but he that hath *Sanguinem Duplicatum*, the whole blood, that is, both of the Father and Mother, ſo as the Half-blood is not inheritable by Deſcent. *Co. Litt.* 14. *a.*

By the old Cuſtom of *England*, the eldeſt Male ſhall Solely inherit, but if it comes to Females, then they being all in Equal Degree of Nearneſs, ſhall inherit all together, and are called *Parcenors*, and all they make but one Heir to the Anceſtor. *Litt. Sect.* 241.

By the Cuſtom of *England*, A man cannot be Heir to Goods, or Chattells, be they Reall or Perſonall, but they ſhall go to the Executors, or Adminiſtrators. *Perkins Sect.* 740. *Co. Litt.* 388. *a.* 20 *H.* 7. 13. *b. Cro.* 1 *part. Darrell* v. *Wilſon*, *f.* 644. *Co. Litt. f.* 8. *a.*

By the old Cuſtom of this Nation, The Child that is born before Eſpouſals is a Baſtard, and ſhall not inherit. *Doctor & Stud. Lib.* 1. *c.* 7.

By the Cuſtom of the Realm, If there be three Brethren, and the middeſt Brother purchaſeth Lands, and dyeth without Heir of his Body, the eldeſt Brother ſhall inherit to him, and not the younger Brother. *Litt. Sect.* 5.

It

It is the Common Law, or Generall Cuſtom, That all Chattels Perſonals are upon Intermarriage given abſolutely unto the Husband, and alſo Chattells Reals, if he ſurvive the Wife: But if the Baron give away, or ſell the Chattels Reals, and dies, the Wifes Intereſt is determined; But if he make no diſpoſition thereof, and his Wife ſurvive him, they remain with the Wife. *Co. Litt.* 46. *b.* 299. *b.* 300. *a.*

Theſe, and ſuch like Cuſtoms are the very peculiar Invention of this Nation, and are delivered over from Age to Age by Tradition; for the Common Law of *England* is an Oral Tradition, and learned by Tradition as well as by Books; And although theſe, or ſuch like Cuſtoms cannot be proved only by Reaſon, that they ſhould be ſo, and no otherwayes, yet they be held Reaſonable, and with the Cuſtom therein uſed ſufficeth in the Law of *England*, and a Statute made againſt ſuch Generall Cuſtoms ought to be obſerved, becauſe they be not meerly the Dictates of Natural Reaſon; for were they ſo, then ſuch Statutes would not be Obligatory, neither *in fori Poli*, nor *in foro Soli*; Becauſe an act of Parliament, made againſt

natural Equity, is voyd in it ſelf, for *Jura Naturæ ſunt immutabilia*, and they are *Leges Legum*.

Hitherto of the *Cuſtoms General*, commonly ſtyled the *Common Law*; Now I come to treat of the other part of the Diviſion, viz. *Cuſtoms Particular*.

2. Of *Particular Cuſtoms*.

Particular Cuſtoms (as hath been ſaid already) be thoſe which are uſed in divers Counties, Cities, Boroughs, Towns, and Lordſhips in this Realm; the which Cuſtoms becauſe they be not againſt the Law of Reaſon, nor the Law of God, though they be againſt the general Cuſtoms of the Common Law, yet nevertheleſs they ſtand in Effect, and be taken for Law, according to that of *Bracton*: *Conſuetudo quandoque pro lege obſervatur, in partibus ubi fuerit more utentium approbata, & vicem Legis obtinet; Longævi enim temporis uſus & conſuetudinis non eſt vilis Authoritas.* So that a Particular Cuſtom is a Reaſonable Act iterated, multiplyed, and continued by the people, de temps dont memoyr ne Court. This is the Definition of a Particular Cuſtom, that has the vertue and force of a Law. Having

Lib. 1. c. 13. nu. 2.

given

given you the Definition of a Cuſtom, I ſhall 1. Propoſe ſome *Queries* with their Reſolutions, 2. Shew you the inſeparable *Properties* of a Particular Cuſtom, And 3. give you ſeveral *Examples* of Particular Cuſtoms found through *England*, but more principally the ſeveral Cuſtoms that are in the Famous City of *London*.

1. *Of the Queries, relating to Cuſtoms* particular.

Whether the Kings Courts be bound to take Cognizance of particular Cuſtoms without pleading of them? Quære 1.

A Cuſtom to devize Lands in *Gavill-Kind*, holden in Socage, ought to be pleaded, and that the Land ſo deviſed was holden in Socage; For although the Court take cognizance of the Cuſtom of Gavill-Kind in *Kent* without pleading, yet of this ſpecial Cuſtom to deviſe Lands in Gavill-kind, or that the Lands are holden in Socage, or that the Feme ſhall have the Moyety for her Dower, they ought not to take cognizance without ſpecial pleading, they being particular Cuſtoms; But Reſ. *Co. Litt.* 175. *b.* *Cro.* 3 *part.* Lambert v. Brooks, f. 562.

for the Cuſtom of Gavil-kind it ſufficeth to ſhew, that it is in *Kent*, and of the Nature of Gavil-kind, without pleading the *Cuſtom*; for the Court doth take knowledge what the *Cuſtom* of Gavil-kind is. And ſo it is of *Burgh Engliſh*.

Quære 2. If the Queſtion be, *Whether there be ſuch or ſuch pretended Cuſtom, ſhall it be tryed by* 12 *Men, or by the Judges?*

Reſ. If it riſe in Queſtion in the Kings Courts, Whether there be any ſuch particular Cuſtom or not, it ſhall be tryed by Twelve men, and not by the Judges, except the ſame particular Cuſtom be of Record in the ſame Court: But General Cuſtoms, that properly be called the *Common Law*, ſhall alway be determined by the Juſtices, whether there be any ſuch general Cuſtom, or not, and not by Twelve Men.

Doct. & Stud. lib. 1. *cap.* 7, & 10.

Quære 3. *Whether there be in our Law a diverſity betwixt a Cuſtom, and a Preſcription?*

Reſ. A Preſcription, ſayes *Coke*, which is perſonal, is for the moſt part applyed to perſons, being made in the name of a certain

tain perſon, and of his Anceſtors, or thoſe, whoſe Eſtate he hath, or in Bodies Politique, or Corporate, and their Predeceſſors; for as a Natural Body is ſaid to have Anceſtors, ſo a Body Politique, or Corporate is ſaid to have Predeceſſors: But a Cuſtom which is *Local* is alledged in no Perſon, but laid within ſome Manor, or other place: As taking one Example for many. J. S. *ſeiſed of the Manor of* Dale *in Fee, preſcribeth thus*: *That* J. S. *his Anceſtors, and all thoſe, whoſe Eſtate he hath in the ſaid Manor, have time out of minde of man had, and uſed to have Common of Paſture in ſuch a place, being the Land of ſome other, as pertaining to the ſaid Manor*: This properly is called a Preſcription. A *Cuſtom* is in this manner: *A Copy-holder in the Manor of* Dale, *doth plead, That within the ſame Manor there is, and hath been ſuch a Cuſtom, time out of mind of man uſed, that all the Copy-holders of the ſaid Manor, have had, and uſed to have Common of Paſture,* &c. *in ſuch a Waſte of the Lord, parcell of the ſaid Manor,* &c. Where the Perſon neither doth, or can preſcribe, but alledgeth the Cuſtom within the Manor.

Co. Litt. 113. *b. lib.* 6. Gatewards caſe, *f.* 60. *b. Lib.* 4. Foiſton & Cruchwoods caſe.

Again, Every Preſcription ought to have by Common Intendment a Lawfull Commencement; but otherwayes of a *Cuſtom*, for that ought to be Reaſonable, and *ex certâ Causâ rationabili uſitata*, as *Littleton* ſaith.

Again, Preſcription may be for a ſhorter time than Cuſtom, *ſſ.* For five years, or one year, or leſs: As if a Fine be duely levyed of Lands or Tenements, and be not gainſaid within 5 years, this is a Barre to all Claim for ever: So if a man omitteth his continual Claim for a year, and a day, then the Tenant in poſſeſſion preſcribeth an Immunity, againſt the Entry of the Demandant, and his Heirs: Out of our Statutes you may have a greater diverſity; ſo that ſeemeth to be a true ſaying, *That Preſcription is an Exception founded upon ſo long time gone, and paſt, as the Law limiteth for the purſuit of any Action:* An Example may be taken out of the Statute of 1 *H.* 8. *c.* 4. which enacteth, *That in all Actions Popular, Information ſhall be made within three years after the Offence committed, otherwiſe to be of no force.*

Preſcription, Cuſtom, and Uſage, are as Brothers, [illegible]h *Kitchin*, and yet ſome-

thing

thing they differ in their natures; for *Prescription* is, When by continuance of time out of memory, one particular person hath particular Right against another particular Person. And *Custom* is, where by Continuance of time out of memory, one Right is had concerning divers persons: And *Usage* is, by continuance of time, the Efficient Cause of them both, and Usage is the very life of Prescription, and Custom; for Prescription and Custom have their Being by Usage of time out of minde, *&c.*

Whether a particular Custom can be alledged against an Act of Parliament? Quære 4.

As to the Resolution of this Question, we must take notice of these three following things: *Res.*

1. That a man cannot prescribe, or alledge a Custom against a Statute, because that is matter of Record in Law: As it hath been adjudged in the Case *inter Grisling & Wood*, where Error was brought, for that in an Action in an Inferiour Court the Declaration was in *English*, whereas by the Statute of 36 *Ed.* 3. *c.* 15. all Entries are to be in *Latine*; and

and although it was ſaid, that the Cuſtom there was ſo uſed, yet this cannot be good againſt a Statute, and the Judgment was reverſed. But yet a man may preſcribe againſt an Act of Parliament, when his Preſcription, or Cuſtom is ſaved by another Act: And therefore the Cuſtoms of *London*, being confirmed by Act of Parliament, may be alledged againſt a Statute. 8 *H.* 7. 4. *b.* *Cro.* 3 *part.* The King *v.* *Bagſhaw* 347. *Co.* 4. *Inſt.* 250.

Co. Litt. 115. *a.* *Lib.* 3 Butler & Bakers caſe, *f.* 35. *a.*

2. There is, ſayes Sir *Edw. Coke*, a Diverſity betwixt an Act of Parliament in the Negative, and in the Affirmative; for an Affirmative Act doth not take away Cuſtom, as the Stat. of Wills of 32 & 34 *H.* 8. doth not take away a Cuſtom to deviſe Lands, as it hath been often adjudged.

3. There is a diverſity betwixt Statutes that be in the Negative; for if a Stat. in the Negative, be declarative of the ancient Common Law, there a man may preſcribe againſt ſuch a Stat. As for Example:

Cro. 1 *part.* Partridges caſe, *f.* 125.

The Stat. of *Magna Charta* provideth, that no *Leet* ſhall be holden but twice in the year, yet a man may preſcribe to hold it oftner, and at other times, for that the Statute

Statute was but in Affirmance of the Common Law.

So the Stat. of 34 *E.* 1. provideth, that none ſhall cut down Trees of his own within a Foreſt, without the view of the Foreſter: But inaſmuch as this Act is an Affirmance of the Common Law, a man may preſcribe to cut down Trees within a Foreſt without view of the Foreſter; And ſo it was adjudged in 16 of *Eliz.* in the Exchequer, by Sir *Edward Saunders*, and other the Barons of the Exchequer.

Whether particular Cuſtoms ought to be ſtrictly taken? Quære 5.

That a Cuſtom particular ought to be ſtrictly taken, it is evident by theſe following Authorities in our Law: *Reſ.*

Cuſtom of *London* is, That a Citizen, and Freeman may devize in *Mortmayn*, but a Citizen, which is a Foreigner, cannot devize in *Mortmayn*, for it ſhall be taken ſtrictly. 5 *H.* 7. 10. *a.* *Vi. Kitchin*, *f.* 209.

Keble and *Vavizor* ſaid, That a Cuſtom ſhall be taken ſtrictly, and therefore a Cuſtom, that an Infant of the Age of 15 years may make a Feoffment, yet a Releaſe, 5 *H.* 7. 41. *a.*

leaſe, which amounts to ſo much, is not good.

So if the Cuſtom be, That a woman ſhall have for her Dower the moyety of Lands, and Tenements, which were her Husbands holden in Socage, within ſuch a Precinct, *&c.* If the Husband have a Bayliwick, or a Fair in Fee, during the Coverture, within the ſame Precinct, the Wife ſhall not have Dower, becauſe it is no Tenement, *&c.* And a Cuſtom ſhall be taken ſtrictly.

Perkins, ſ. 84. *b.* 11 *E.* 3. Dower. 85.

So an Infant by the Cuſtom of Gavillkind at the age of 15 years may make a Feoffment, yet he cannot make a Will upon the ſame Feoffment. For Cuſtom ſhall be taken ſtrictly.

22 *E.* 4. Tit. 17.

So where Lands in *Borough Engliſh* deſcend to the youngeſt Son, and he dies without Iſſue, adjudged that it ſhall not go to the younger Brother; For that Cuſtom doth not hold place betwixt Brothers without a ſpecial Cuſtom, That they ſhall deſcend to the youngeſt Brother, but the Eldeſt ſhall have the Lands, becauſe Cuſtoms ought always to be taken ſtrictly.

Cro. 2 *part.* Baylie *v.* Stevens, 198. *Cro.* 3 *part.* Reve *v.* Malſter, 411.

Quære 6. *Whether a thing of Common Right may be enlarged by Cuſtom?*

The

The Rule of Law is, that whensoever a man hath any thing of Common Right, and by Course of Law, the same may well be inlarged by Custom, and Prescription, as the Lord of a Mannor, that hath a Court Baron, of Common Right, and by Course of Law all Pleas therein are determinable by Wager of Law, and yet by Prescription the Lord may prescribe to determine them by Jury. *Resp.* *Co. 2. Inst. 143. 12 H. 7. 8, 9.*

A Custom, which addeth more Solemnity to the Common Law, whether good? Quære 7.

A Custom, which addes more Solemnity to the Common Law of *England*, is good, and valid; And therefore it was adjudged a good Custom in *Weymouth*, in the County of *Dorset*, when the Custom of the Vill was (being a Port-Town) That a Feoffment there, unless it be made in the presence of some of the Masters of the Vill, shall be voyd. *Resp.* *Co. Lib. 5. Perimans Case. f. 84. Cro. 1 part. Parman v. Bowyer. f. 669.*

Whether a fixt Custom, though unreasonable, can be taken away without an Act of Parliament? Quære 8.

It

Ref. It is to be noted, ſayes *Coke*, that a Cuſtom once reaſonable and tolerable, if after it become grievous, and not anſwerable to the Reaſon whereupon it was grounded, yet it is to be taken away by Act of Parliament, for an Inheritance once fixed, cannot be taken away but by Parliament.

Co 2. Inſt. f. 664.

Quære 9. *Whether a Cuſtom be unreaſonable that is contrary to a particular Maxim of the Law Poſitive?*

Ref. A Cuſtom is not unreaſonable, that is contrary to a particular Rule or Maxim of the Common Law: For *Conſuetudo ex certa Cauſa Rationabili uſitata privat Communem Legem*: A Cuſtom uſed upon a certain, and Reaſonable Cauſe depriveth the Common Law: As the Cuſtoms of *Gavil-kind*, and *Borough Engliſh* are repugnant to the Maxim of Deſcent of Inheritance: The Cuſtom of *Kent*, *The Father to the Bough, the Son to the Plough*, is againſt the Maxim of Eſcheats; And ſo there are many other Cuſtoms, that being contrary to particular Rules of the Law, are yet held, and adjudged Reaſonable, for they may have a Reaſonable Commencement,

Litt. Sect. 169.
Cro. 1 part. Snelling *v.* Norton.
Davys Reports, Le Caſe de Taniſtrye, *f. 32. a.b.*

mencement, ſo that they are not prejudicial to the Commonwealth, nor to the preſent Intereſt of any particular perſon. Thus much for the *Queſtions*, that do relate to *particular Cuſtoms*: I come now to the *Properties* of every Cuſtom that is allowed in our Laws.

2. *Of the* Properties *inſeparable, which Cuſtoms Particular ought to have.*

EVery particular Cuſtom ought to have Four Inſeparable *Properties*. 1. It ought to have a *Reaſonable Beginning*. 2. It ought to be *Certain* and not *Ambiguous*. 3. *Continuance* without Interruption time out of Memory of Man. 4. A Cuſtom ought to be *Subject* to the *Prerogative Royall*, and not be exalted above it. Of theſe in their Order.

1. The *commencement* or Beginning of a Particular Cuſtom ought to be founded upon a Rational Baſis, or Cauſe: For if it be unreaſonable in the Original, no Uſage, or Continuance can make it good: Agreeable to the Rules of the Roman Laws. *Quod*

D. 50. 17. 29. *Quod initio vitioſum eſt, non poteſt tractu temporis convaleſcere.*

Quod ab initio de jure non valet, tractu temporis convaleſcere non debet.

Nullum ab initio, ex poſt facto non fit validum. i.e. A good Execution cannot profit, where the Conſtitution is defective.

Litt. Sect. 209. And therefore, if the Lord of a Mannor will preſcribe, that there hath been a Cuſtom within his Mannor, time out of minde of man, That every Tenant within the ſame Mannor, who marryeth his Daughter to any man without Licenſe of the Lord of the Mannor, ſhall make Fine, and have made Fine to the Lord of the Mannor for the time being, this Preſcription or Cuſtom is voyd; for none ought to make ſuch Fine, but only Villeins. For every Free-man may freely marry his Daughter, to whom it pleaſeth him, and his Daughter, and for that this Preſcription is againſt Reaſon, ſuch Preſcription is voyd.

5 H. 7. 9. 6. *Litt. Sect.* 212. So a Cuſtom, that one may keep the Diſtreſs untill he be ſatisfied at his will, this Cuſtom is voyd: Becauſe it is againſt Reaſon, that if wrong be done any man, that he thereof ſhall be his own Judge: For by ſuch way, if he had Damages

ges but to the value of an Half-penny, he might assesse, and have therefore 100 *l.* which should be against Reason.

So a Custom, that the Lord shall take for a Hatriot the Beast of a Stranger *Levant* and *Couchant* upon the Land of the Tenant is voyd: Because this Custom cannot have a Lawfull, or Reasonable beginning betwixt the Lord, and a Stranger. *Dyer* 139 *b.* *Cro.* 1 *part.* Parker *v.* Cumbleford. 725.

So a Custom, that the Lord of the Manor shall have three pounds for pound-breach of every Stranger, is void. 11 *H.* 7. 13. *b.* 14. *a.*

So a Custom for Parishioners to pay their Tithes truely without view of the Parson is not good, for it is against Common Reason, that any man judge, or divide for himself. *Hob. Reports.* Wilson *v.* *Bp. of* Carlisle. 107.

So a Custom of a Parish to take Fees for the Buryall of a Dead person, though carried through, and buryed else-where, is voyd, because it is against Reason, that he that is no Parishioner, but may pass through the Parish, or lye in an Inne for a night, should be forced to be buried there, or to pay as if he were; and so upon the matter to pay twice for his Buriall. In the Civil Law you have these words; *In nullo quopiam Loco Vectigal ab* *Hob. Rep:* Topsall *v.* Ferrers, *f.* 175, 176.

aliqua Persona pro Corporibus ex uno Loco in alium translatis præstetur. Græc. Cod. de Relig. & Sumpt. Fun. L. 15.

Hob. Reports, Harbin *v.* Green, *f.* 189. So a Custom to have Suit to a Mill for all Corn spent, and sold, is voyd, because unreasonable.

Hob. Rep. Barker *v.* Cocker. 329. So a Custom to have all the Lambs of the Parish reckoned together, as one mans, is voyd, because unreasonable; For by this means it might fall out, that some one might have but one Lamb, and that might be taken for Tithe, and he that had more should pay nothing at all.

Cro 2 *part.* Vaughan *v.* Holdes. So an Infant Tenant in Tayle of Land in Gavill-kind (where the Custom was, that an Infant above the Age of 15 years, might make a Feoffment, and bind himself) made a Feoffment of the Land intayled. This Feoffment is no discontinuance, to binde the Infant, nor was good by the Custom; for the Custom shall never inable him to do a Tort, or an unreasonable Act.

2 *H.* 4. 24. So a Custom that none shall put his Beasts into the Fields after the Corn severed, and carried, before the Lord put in his Beasts, is not good, for peradventure the Lord will never put in his Beasts; and therefore the Custom is repugnant to Common Reason. So

So a Custom of a Mannor, for a Copy-holder for Life, to cut down, and sell Trees, is a voyd Custom, and unreasonable, and not allowable by the Law of *England*; for it is in destruction of the Inheritance, and against the nature of a Copy-holder for Life. Thus much of the *First Property*. *Cro. 3 part.* Rockey *v.* Huggins.

2. The *Second Property* required in a *Particular Custom* is *Certainty*: As for Example:

A Writ of *Dum fuit infra ætatem* was brought against an Infant, the Tenant pleaded a Custom, that when an Infant is of such Age as he can count xii *d.* or measure an Ell of Cloth, his Feoffment is good: This Custom is adjudged voyd for the uncertainty. *6 E. 3. 4. 13 E 3. Fitz. Barre. 277. Hob. Rep. 225.*

So to claim Common *Ratione Commorantiæ in Villa de Dale* is not good, for no man may have Interest in Common in Respect of a Messuage, wherein he hath no Interest; For *Custom* should always extend to that, which hath *certainty* and *continuance*. *Co. Lib. 6.* Gatewards Case.

So in a *Replevin* brought against the Prioress of *Shafton*, the Defendant avowed

as Bayliff to the Sheriff of *Dorſet*, that
42 *E.* 3. 40. preſcribes to hold his *Tourn* in the place where, *&c.* And to have of every Tenant a Demy-mark, or a Horſe as a Reward at every *Tourne*. This Preſcription is voyd for the uncertainty: And this lyes in the Will of the Donor, which is uncertain.

3. A Particular *Cuſtom* ought to have *Continuance* without Interruption, time out of the memory of Man; for if there
28 *H.* 8. *Dy.* 30. *b.* be a diſcontinuance within time of Memory, the Cuſtom is gone, and Extinct, according to the Rule of our Law: *Conſuetudo ſemel reprobata non poteſt amplius induci.* As if a Copyhold be leaſed by the Lord of the Mannor, for Life, or Years, according to the courſe of the Common Law, it ſhall not be again demiſed as Copy-hold, according to the Cuſtom afterwards.

So a Cuſtom upon a ſpecial Verdict was found to be, that if a Copy-holder in Fee dyed ſeiſed, his Feme ſhould hold it during his Life, as Frank-Bank, The Lord infeoffs the Copy-holder, who
Cro. 2 *part.* dyed ſeiſed, whether ſhe ſhould have
Lathmner it, *&c.* Adjudged that ſhe ſhould not,
v. Avery. for the Land is not now Copy-hold, be-

cauſe

cauſe it is abſolutely extinct by the Feoffment.

So if a Copy-hold eſcheateth, and the Lord maketh a Feoffment in Fee upon Condition, and entereth for the Condition broken, it ſhall never be Copyhold again. *Co. Litt. 202. b.*

So if Tenant by Homage Aunceſtrell maketh a Feoffment in Fee upon Condition, and entereth upon the Condition broken, it ſhall never be holden by Homage Aunceſtrell again. And the Reaſon in all theſe Caſes is, for that the Cuſtom, or Preſcription for the time is interrupted. *Co. Litt. 202. b.*

4. And laſt property is, that a *Cuſtom* ought to ſubmit it ſelf to the *Prerogative* of the King; for that Cuſtom that exalts it ſelf above the Prerogative Royal is voyd as to the King; And the Reaſon is, becauſe Preſcription of time maketh Cuſtom, but no time runneth to the King.

As in the Caſe of *Whit Tawers*, the Cuſtom of *London*, to make Corporations is held voyd, for the King only can do it, by his Prerogative. 49 *E.* 3. 3.

So the Cuſtom of *London*, to retain goods pledged, till ſatisfaction be made

35 H. 6. 26. a. of the money, for which they were engaged, doth not extend to the Jewels of the Crown.

35 H. 6. 28. So Sale in Market Overt, doth not alter the Property of the Kings goods, but he may ſeize, when he pleaſeth.

So if a man has Toll, or Wreck by Preſcription, this ſhall not extend to the Goods of the King.

So Preſcription to have Sanctuary for Treaſon, or to have *Catalla Felonum*, &c. is void againſt the King, becauſe ſuch a Priviledge *Exaltat ſe in Prærogativam Regis.*

1 H. 7. 23. b.

Thus you ſee, that *Cuſtoms particular* ought to have the Four aforeſaid Properties, whereby they may obtain the force of Laws. I proceed now to the Third thing propoſed, *viz.* To give you ſome Inſtances of particular Cuſtoms, that I have met with in our Law-Books.

3. *Of* Cuſtoms *that are found in Particular Places, as Counties, Cities, Boroughs, Vills, and Lordſhips.*

IT is a Cuſtom in the County of *Kent*, that Iſſues male ſhall equally inherit, and it is called *Gavill-kind*; and the moſt uſual Cuſtoms that are Attendant on this Cuſtom of *Gavil-kind* are, That the Heir of the Age of 15 years, may give, and ſell his Lands, and ſhall inherit though his Father be attainted, and hanged for Felony, according to the uſual ſaying, *The Father to the Bough, the Son to the Plough.* The Wife ſhall be endowed of the Moyety of the Lands, whereof her Husband dyed ſeiſed, ſo long as ſhe keeps her ſelf Sole, and without Child. A man may be Tenant by the Courteſie without having any Iſſue. Lands in Gavil-kind are deviſable by Cuſtom, and Mr. *Lambert* ſaith, That Lands in Gavil-kind may be given, or ſold without the Lords Licenſe. 1. Gavillkinde.

Note, That in no County of *England* Lands at this day be of the Nature of

Gavil-kind, of Common Right, saving in *Kent* only. But yet in divers parts of *England*, within divers Mannors, and Seigniories, the like Custom is in force. As in the Mannor of *Islington* the Custom is, that all the Sons, and all the Brothers shall inherit together.

2. Borough English. It is the Custom of some Boroughs, as at *Notingham*, that the younger Son shall inherit before the eldest, and this is called **Burgh English**: *Doctor & Stud. Lib.* 1. *cap.* 10. *Litt. Sect.* 211.

3. Frankbank. It is the Custom of some places, That the woman being espoused a Virgin, shall have all the Copyhold Land, whereof the Husband dyed seized, and this is called *Franke-banke*.

Kitchin, f. 102. *Bract. lib.* 4. *Tract.* 6. *cap.* 2. *Fitzh.* calls this a Custom, by which in some Cities the Wife shall have all the Lands of her Husband for her Dower. *Nat. B.* 150. *Plowd. Com. f.* 411. *Litt. Sect.* 37. *Cro.* 2. *part. Lathmer* v. *Avery, f.* 126.

Co. Litt. 33. *b.* *Note*, That as Custom may inlarge Dower, so may Custom abridge it, and restrain it to a Fourth part.

4. Rent. It is the Custom of some Mannor, that the Wife shall have the third part of the Rent, and not any Land for her Dower, as at *Bush*.

In

In ſome places in *Wales*, the Wife ſhall have the Moyety of the Goods, whereof her Husband dies poſſeſſed. *Cro.* 3 *part.* Lord *Haſtings* v. *Douglaſs.* 5. Moyety of Goods.

Within the Mannor of *B.* in the County of *Berks* there is ſuch a Cuſtom, That if a man hath divers Daughters, and no Son, and dyeth, the eldeſt Daughter ſhall only inherit; and if he have no Daughters, but ſiſters, the eldeſt Siſter by the Cuſtom ſhall inherit, and ſometimes the youngeſt. 6. Eldeſt Daughter or Siſter. *Co. Litt.* f. 140. b.

In the Mannor of *Odiham* the Cuſtom is, That Lands are deſcendable to the eldeſt Daughter. *Cro.* 3 *part.* Moulin v. Dalliſon.

It is a Cuſtom at *Toſſiter*, for a Common Bake-houſe, reſtraining others within that place, to bake bread there, and adjudged Reaſonable. *Vi. Co. Lil.* 8. *The Caſe of the City of* London. 7. Common Bake-houſe. *Cro.* 1 *part.* Fermor v. Brooke. 203.

In ſome places Chattells as Heir-Looms (as the firſt beſt Bed, Table, Pot, Pan, Cart, and other dead Chattells moveable) may go to the Heir, and the Heir in that Caſe may have an Action for them at the Common Law, and ſhall not ſue for them in the Eccleſiaſtical Court, but the Heir-Loom is due by Cuſtom, and not by the Common Law. 8. Heir-looms. *Co. Litt.* 18. b.

It is a Cuſtom of the Hundred of *Stretford*,

ford, quòd hæredes Tenementorum infra Hundredum prædictum existen. post mortem Anteceſſorum ſuorum habebunt, &c. *Principabium Anglicè* an Heir-loom, viz. *De quodam genere Catallorum, Utenſilium,* &c. *optimum Plauſtrum, optimam Carucam, optimum Cyphum,* &c.

9. Inquiſition of a Debt upon a Bond.

It is a Cuſtom of the City of *Norwich*, to inquire of a Debt upon a Bond.

Cro 1 *part.* Grice *v.* Chambers. *f.* 894.

Error upon a Judgment in *Norwich* in Debt upon an Obligation; where the Defendant confeſſed it to be his Deed, but, according to the Cuſtom there, prayed, *Quod inquiratur de Debito.* And thereupon the Court awarded a Precept to the Serjeant to make an Inqueſt to inquire thereof, which Inqueſt was returned, and found it to be a Certain Summe, for the which Summe the Plaintiff had Judgement to recover. And this matter was aſſigned for Error; And, becauſe it was done according to Cuſtom, it was not reverſible. And thereupon the Judgement was affirmed.

10. The Nomination of a Succeſſor.

It is a Cuſtom within the Mannor of *Beauminſter*, That a Copyholder for Life may nominate his Succeſſor to have it for Life; and that ſuch a Perſon nominated ſhould compound with the Lord for his Fine;

Fine; and if he could not compound, then he ſhould give ſuch a Fine as the Homage of the Mannor ſhould aſſeſs, and ſhould be admitted, and hold for his Life. *Cro. 2 part. Ford v. Hoskins. f. 368.*

It is Cuſtom of *Ipſwich* for Burgeſſes, to make a Feaſt upon their Election. 11. Making a Feaſt.

Wallis a Burgeſs of *Ipſwich* was committed to Priſon, and upon an *Habeas Corpus*, the Cauſe was returned; That the ſaid Town was an antient Vill, and that therein was a Cuſtom to elect every year two of the Burgeſſes, who are called who uſed to make a Feaſt upon ſuch a day; And that the Defendant being elected, refuſed to make that Feaſt; wherefore he was fined to pay 20 pounds, and impriſoned, untill he payd the Fine. And this was allowed to be a good Cuſtom, and well returned: Wherefore the Priſoner was remanded.

It is a Cuſtom within the Mannor of *Turlox* in the County of *Bedford*, That the Land is Demiſeable for 21 years, paying the Treble value of the Rent: And if the party dyed within the Term, That the Term ſhould be to his Heir, paying a *Fine Certain* of one years Rent, and if he aſſigned the Term, the Aſſignee ſhould have it, paying for a Fine, one years value of 12. Of a Fine. *Cro. 2 part. Page v. — f. 671.*

of the Rent; And he who had it, might by the Cuſtom, renew it for 21 years, paying Three pounds value.

13 Of Females. *Co. 4. Inſt. f 241.* By the antient Cuſtom of *Wales*, Females could not inherit, but at this day women are inheritable in *Wales*, according to the Common Law in *England*.

14 Of a Neif. *Co. Litt. 123. a. Bract. Lib. 4. Tract. 3. c. 13. nu. 2.* It was a Cuſtom in *Cornwall*, *quod ſi Liber homo ducat nativam aliquam in uxorem ad liberum Tenementum, & Liberum Thorum, ſi ex ea duæ procreantur filiæ, una erit libera, & altera villana, quia ibi partiti ſunt pueri inter liberum patrem, & dominum uxoris Villanæ.*

15 Of Law-wager. By the Cuſtom in ancient Cities, and Boroughs, in an Action of Debt a man ſhall not wage his Law againſt a Merchants Book. *Perkins Tit.* Deeds.

16. Of Year, Day, & Waſte. *N. B. 100 a.* *Per Prærogativam Regis* cap. 17. the King ſhall have of the Lands of Tenant in Fee Simple, attaynted of Felony, *Year*, *Day* and *Waſte*; and after the year they ſhall be delivered to the Chief Lords, except Lands in *Gloceſter*, and that by Cuſtom, where Tenements ſhall revert to the next Heirs maintenant after ſuch Felonies done, as if no Felony had been done.

17. Of a Bull and Boar. There is a Cuſtom in *Quarleyes* in the County of *Southampton*, That the Parſons there

there at all times of the year have uſed to keep within the Pariſh, a common Bull, and a common Boar, for the common uſe of the Kine and Sows of the Pariſhioners at any time *Quandocunque neceſſe foret*, for the Increaſe of Calves, and Piggs within the ſaid Pariſh: Adjudged a good, and Reaſonable Cuſtom.

Cro. 1 part. Yielding *v.* Fay. *f.* 569.

In the Regiſter you may ſee, that a woman was baniſhed out of the Town of *Calice* for Adultery, by the Cuſtom of that place, and there appeareth *Charta Pardonationis pro muliere haunita: Sed nos non habemus talem Conſuetudinem*; and if we had, it would be now a days thought by the Wives of our Cities, Boroughs and Towns a very unreaſonable Cuſtom, yea intollerable, ſince it hath been the mode to frequent publick places.

Thus you have had ſeveral Inſtances of the *particular Cuſtoms* within the Realm of *England*, I will now give you the Cuſtoms, that I have found in our Books appertaining to the City of *London*.

The

The Cuſtoms *of the Famous City of* London *are theſe following.*

1. *Concerning Market Overt.*

12 *E.* 4 1. 11 *E.* 4. 8, & 9.

IT is a Cuſtom of *London*, that there ſhall be a Market Overt every day of the Week, except Sundayes and Holidayes, and in their Shops, as well as in other places of the City.

As to this Cuſtom take theſe Reſolutions.

Co. Lib. 5. The Caſe of *Market Overt.* f. 83.

Shops in *London* are Markets Overt for things to be ſold there by the Trade of the Owner, therefore if Plate be ſold there in a Scriveners Shop, the Property is not altered, otherwiſe in a Goldſmiths Shop, if he who paſſeth in the ſtreet may ſee it.

Cro. 1 *part.* Palmer *v.* Woolley. 454.

Action ſur Trover. A Preſcription was alledged in *London*, That every ſhop in *London* ſhould be ſaid to be a Market Overt for all Wares there ſold, which the Court upon the firſt motion conceived to be too generall, and unreaſonable a Cuſtom. And *Anderſon* ſaid, it had been agreed,

agreed, that if one buyes in a Shop any thing which appertains not to his Trade, as to buy Plate in a Mercer, or Drapers Shop, it is not a Market Overt as to that purpoſe. So if the Sale be in a Back-ſhop, or in another place not open, no property ſhall be changed by ſuch Sale.

Action ſur Trover, of a Silk Quilt, a Teſture of a Bed, Fine Silk Curtains, and a Cloak. The Defendant *quoad* all beſides the two laſt, pleaded *Not Guilty*; *Quoad* them he pleaded, That the City of *London* is an Antient City, and that within the ſame is a Market every day for all Goods to be ſold in every part of the City, in every open Shop, every day beſides Sundayes and Holidayes, betwixt Sun-riſing, and Sun-ſetting, ſo as one of the Contractors be a Freeman; And that he being a Free-man of the Company of Mercers, ſuch a day not being Sunday, or Holiday, bought thoſe things in his open Shop, wherein he had a long time uſed to buy ſuch Wares, of one *Henry Cooper*, for ſuch a ſumme, and ſo juſtifies the Converſion: And upon this Plea, the Plaintiff demurred; and upon the firſt motion at the Barre, all the Court conceived, that the Plea was not good; For the

Cro. 2 part. Taylor *v.* Chambers.

the Cuſtom is too generall, that every Freeman might buy all manner of Wares in every Shop, *&c.* For then a Scrivener might buy Plate in his Shop, and the like, *&c.* which is not Reaſonable. And here he being of the Myſtery of the Mercers, to buy Petticoats, and Cloaks, *&c.* It is not agreeable to his Trade. And *Popham* ſaid, that it had been Reſolved, that ſuch Cuſtom being found by a Special Verdict was unreaſonable: Wherefore it was adjudged for the Plaintiff.

2. *Concerning the Office of Coroner.*

Dyer 317. *Stamford Lib.* 2. *c.* 31. *f.* 94. *Co* 4. *Inſt. f.* 250.

BY the Cuſtom of *London*, the Lord Maior (the Kings Butler) is perpetual Coroner, and the Court of Coroner is holden before him, or his Deputy. And likewiſe his Lordſhip is Eſcheator there by Cuſtom.

Co. Litt. f. 183. *b.*

In Caſe of Outlawry the Judgement is given in the County Court, by the Coroners, ſaving in *London* Judgement is given by the Recorder, and not by the Maior, and the Judgement in the County Court is, *Ideo utlagetur per Judicium Coronatorum*, and in *London*, *Per Judicium Recordatoris.*

Error

Error to reverſe an Outlawry in a *Quo Warranto*; The Error aſſigned was, becauſe the Exigent is returned, *Ideo utlegatus eſt*; And he doth not name any Coroners, *ſed non allocatur*; For this Outlawry being in *London*, where there is not any Coroner, but the Maior for the time is perpetual Coroner; And the Courſe is not to return there *Per Judicium Coronatorum*; but generally, *Ideo utlegatus eſt*.

Cro. 2 part. Garrard *v.* Regem. *f.* 531.

3. *Concerning Parſon, and Church-Wardens.*

BY the Cuſtom of *London*, the Parſon, and Churchwardens are a Corporation, to Purchaſe, and deviſe their Lands.

12 *H.* 7. 20 *Cro.* 2 *part.* Warners Caſe. 49 *E* 3. 11.

4. *Concerning the Election of Church-Wardens.*

BY the Cuſtom of *Alhallows* in *London*, the Pariſhioners there uſe to elect Church-wardens, and not the Parſon. As appears by this adjudged Caſe,

Co. Lib 13. *f.* 70.

Warner one of the Church-wardens of *Alhallows* in *London* prayed a Prohibition, for that whereas by the Cuſtom of the

Cro. 2 part. Warners Case.

said Parish, the Parishioners used every year to elect Church-wardens, one of the Parish who had born the Office of Scavenger, Sidesman, or Constable; And that every year one, who had been elected Churchwarden, is elected to continue a year longer, and to be the Upper Church-warden, and another is chosen to him, who is called the Under Church-warden; That such a Choyce being made in that Parish of the said *Warner* to be Church-warden, the Parson, notwithstanding that Election, nominated one *Carter* to be Church-warden, and procured to be sworn in the Ecclesiastical Court, and denyed the said *Warner* as Church-warden, according to the Election of the Parishioners; and this by colour of the late Canons, That the Parson should have the Election of one of the Church-wardens: And this being against the Custom, a Prohibition was prayed, and a President shewn in the Common Bench, *Pasch. 5 Jac.* for the Parishioners of *Walbrooke* in *London*, where such a Prohibition was granted; For it being a special Custom, the *Canons* cannot alter it, especially in *London*, where the Parson, and Church-wardens are a Corporation; And if every Parson might have

have election of one Church-warden without the Aſſent of the Pariſhioners, they might be much prejudiced, *&c.*

5. *Concerning the Choice of a Clerk.*

IT is a Cuſtom of the Pariſh of Saint *Katherines* in *Coleman-ſtreet* to place a a Clerk there, by the Election of a Veſtry.

Jermin, Rector of the Pariſh of St. *Katherines* in *Coleman-ſtreet*, and *Hammond*, as Clerk there, ſued in the Spiritual Court, to have the ſaid Clerk eſtabliſhed there, being placed there by the Parſon, according to the late Canon, *That the Parſon of the Church ſhould have the placing of the Clerke*; where the Pariſhioners diſturbed him upon pretence of a Cuſtom to place a Clerk by the Election of their Veſtry. And upon this ſurmiſe of a Cuſtom, the Church-wardens, and Pariſhioners prayed a Prohibition; and after divers motions, a Prohibition was granted: For they held, That it was a good Cuſtom, and that the Canon cannot take it away. *Cro. 2 part.* Jermins Caſe.

6. Concerning Tithes for Houſes.

BY the Cuſtom of *London*, Tithes are payd for the yearly Rent, or value of Houſes.

As to this Cuſtom take theſe Reſolutions following:

Co. Lib. 11. Grants Caſe.

1. Reſolved, it is a good Preſcription, that every Inhabitant in a Pariſh have paid two ſhillings in the pound, of the value of their Houſes, *per annum*, in Lieu of Tithes, becauſe it may have a Lawfull beginning, for it may be that this was ſo time out of minde, for the Lands, whereupon Houſes were built, as a *Modus Decimandi*.

2. Reſolved, That the Parſon may ſue for it in the *Court Chriſtian*, for that it is in the name of Tithes, and every ancient City and Borough, had for the moſt part ſuch Cuſtom for their Houſes, for the maintenance of their Parſon.

Hob. Rep. Leyfield v. Tiſdale.

Doctor *Leyfield* Parſon of St. *Clements* without *Temple-Barre*, ſued over *Tyſdale* his Pariſhioner for Tithes of certain Stables, and Libelled, that of Common Right, and by Preſcription out of minde, the Parſon there uſed to have a *Modus Decimandi*

mandi for the Houſes, Stables, and Buildings, that is to ſay, after the Rate of the Tenth part of the Yearly Rent, or value of the ſame, and ſo he proceeds to demand accordingly; whereupon a Prohibition was deſired, and the Opinion of the Court was, that a Prohibition was to be granted, for *de Communi Jure*, no Tithes are to be paid for the Yearly Rent, or value of Houſes, for Tithes are paid for the Revenue and Increaſe of things; and therefore no Tithes are to be paid in any ſuch Caſe, in any Cities, or Towns in *England*, ſaving in *London*, and this Pariſh is out of *London*, and the Liberties thereof.

7. *Concerning the Chamberlayn of* London.

THE Chamberlain is a Sole Corporation, to him and his Succeſſors for Orphans; and a Recognizance, or Bond, made to him and his Succeſſors concerning Orphans, ſhall by Cuſtom go to his Succeſſor, as appears by theſe following Authorities:

In caſe of a Sole Corporation, or Body Politique, as Biſhop, Parſon, Vicar, *&c.*

no Chattell, either in Action, or Poſſeſſion, ſhall go in Succeſſion, but the Executors or Adminiſtrators of the Biſhop, Parſon, &c. ſhall have them no more than the Heir of a private man can have them, for Succeſſion in a Body Politique is as an Inheritance in caſe of a Body private. But otherwiſe it is in caſe of a Coporation compoſed of many, as a Dean and Chapter, Maior and Commonalty, and ſuch like, for there they in Judgement of Law never dye. Yet the Caſe of the Chamberlayn of *London* differeth from all theſe, and his Succeſſor may in his own Name have Execution of a Recognizance acknowledged to his Predeceſſor for Orphanage money, and the Reaſon is, becauſe that in this caſe, the Corporation of the Chamberlain is by Cuſtom, and the ſame Cuſtom that hath created him, and made a Corporation in Succeſſion as to the ſaid ſpecial purpoſe concerning Orphanage, the ſame Cuſtom hath inabled the Succeſſor to take ſuch Recognizances, Obligations, &c. that are made to his Predeceſſor. And this Cuſtom is founded upon great Reaſon, for the Executors, or Adminiſtrators of the Chamberlain ought not to intermeddle with ſuch Recognizances,

Obligations,

Obligations, *&c.* which by the ſaid Cuſtom are taken in the Corporate capacity of the Chamberlain, and not in his private.

Error of a Judgement in Debt in the *Common Bench* upon Confeſſion. The Error aſſigned was, That *Willford* brought debt upon an Obligation, as Succeſſor of *Brandon* late Chamberlain of *London*, That the Chamberlain hath uſed from time, *&c.* to take Bonds to him, and his Succeſſors. And that there is a Cuſtom there, That the Succeſſor of the Chamberlain ſhall ſue thoſe Bonds in any Court, and further alledges, That all their Cuſtoms are confirmed *per Parliament.* 7 *R.* 2. And the Plaintiff had thereupon Judgement, whereas by Law this Obligation, being a Chattell, cannot go to a Succeſſor. And for this Cauſe *Foſter* moved, That it was Error, and the Judgement ought to be reverſed: For there is a difference as it appears 20 *E.* 4. 2. betwixt an Obligation made to a Corporation, which conſiſts of one ſole perſon, as Parſon, Prebend, *&c.* For that ſhall not go to his Succeſſor; for he may make an Executor, who ſhall have the Benefit thereof: But of a Corporation, which conſiſts of divers Perſons, as Dean and Chapter, *&c.* which

Cro 1 *part.* Byrd *v.* Willford. *f.* 464.

cannot have an Executor, There the Obligation made to one ſhall go in Succeſſion: And here by the Death of the Chamberlain, in the *Interim*, before a Succeſſor ſhall be elected, none can have the Action: And if it ſhall go to the Succeſſor only, the Action is ſuſpended; and a perſonal action once ſuſpended, is gone for ever. But on the other part it was moved, That in regard it is alledged to be a Corporation for that purpoſe to take Obligation, it may be well allowed, and ſhall go to the Succeſſor, and not to the Executor, and ſo is 8 *E.* 4. 18. And ſo was the Caſe Rule here, *Paſch.* 21 *Eliz. Mabbes* Caſe. And *Godfrey* ſaid, That it was one *Taylors* Caſe, ſo ruled accordingly: Where Debt was brought by the Succeſſor of the Chamberlain, in the Maiors Court, upon ſuch an Obligation, and a Recovery, and Error thereof brought, and before *Manwood*, and other ſpecial Commiſſioners for this purpoſe, the Judgment was affirmed. And of that Opinion were *Gawdy* and *Fenner* (*Popham*, & *Clench abſentibus*) For the Chamberlain is a Special Corporation to that purpoſe, and an Obligation may as well go in Succeſſion, as Land (as *Dyer* 48. is) and therefore the Cuſtom being averred

to

to be ſo, it is lawfull and Reaſonable, *&c.* Wherefore they gave Rule, That, if other matter were not ſhown to the contrary upon the firſt of the next Term, that the Judgment ſhould be affirmed.

Note, In *Mich.* 43, & 44 *Eliz.* in the Queens Bench, betwixt *Wilford*, and *Hutten*, Debt was brought upon ſuch a Recognizance made to *Brandon* his Predeceſſor, alledging the Cuſtom of *London* for the Chamberlain to take Obligations, or Recognizance to them, and their Succeſſors, for Orphans portions. And, after Judgement for the Plaintiff, Error was brought thereof in the Exchequer Chamber, where the Judgement was affirmed.

But the Queſtion may be, *Whether a Recognizance taken in* London *for Orphanage Money, be ſuable in the Courts at* Weſtminſter? Quære.

Debt upon a Recognizance, acknowledged to the ſaid Plaintiffs in *London*, according to the Cuſtom there, for Orphanage money, and alledged the Cuſtom, that had uſed there to take ſuch Recognizances, and the Queſtion was, Whether Debt lyeth in this Court, or was to be brought in *London* only, where it is maintainable by the Cuſtom? And all the Court Reſ.

Court reſolved, That it was a good Recognizance; And that Debt lyeth for it in this Court. And *Coke* the Queens Attorney, who was of Council in the Caſe, ſaid, That it hath been ſo adjudged in this Court between *Sharington*, and *Fulwood*.

8. *Concerning the Cuſtody of Orphans.*

IT is a Cuſtom of *London*, that the Maior, and Aldermen there, have the Wardſhip of Orphans, and diſpoſition of their Lands, and Goods.

Co. 4 Inſt. 248. The Maior, and Aldermen, ſayes *Coke*, by cuſtom have the Cuſtody of Orphans within the City of *London*. And if they commit the Cuſtody of the Orphans to another man, he ſhall have a Raviſhment of Ward, if the Orphan be taken away. *Vi. F. n. P.* 142. *g.* 32 *E.* 3. *gard.* 31.

9. *Concerning the Lord Maiors Examination of Plaintiffs.*

Co. 4. Inſt. f. 248. THe Cuſtom of *London* is, and hath been time out of minde, that when a man is impleaded before the Sheriffs, the Maior upon the ſuggeſtion of the Defendant may ſend for the Parties, and for the

the Record, and examine the Parties upon their Pleas, and if it be found upon his Examination, that the Plaintiff is satisfied, that he may award that the Plaintiff shall be barred. *Co. Lib. 8. f. 126.*

Note, This Custom holds good, before any Judgement given, but by no custom the Maior can examine after Judgment.

10. *Concerning the Advancement of Children.*

THe Custom of *London* is, That if the Father advance any of his Children with any part of his Goods, that shall barre them to demand any further part, unless the Father under his Hand, or in his last Will do expres, or declare, That it was but in part of Advancement, and then that Child so partly advanced, shall put his part in *Hotchpott*, with the Executors, and Widow, and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in Effect, which the Civilians call *Collatio Bonorum*. *Co. Litt. 176. b.* *Co. Lib. 11. f. 113.*

11. *Con-*

11. *Concerning a* Conceſſit Solvere.

IT is a Cuſtom of *London*, to maintain an Action of Debt, *Sur conceſſit ſolvere*. 1 *H.* 7. 22. *a. Pyndes Caſe.* 1 *E.* 4. 6. 38 *H.* 6. 29.

Natura Brevium, Tit. Brief, Quo Warranto. *f.* 161. *b.*

It is the cuſtom of the City of *London* to have an *Action ſur conceſſit ſolvere*, and to enquire of the Duty of the Obligation confeſſed, and pray that the Duty may be inquired of, *&c.*

Cro. 1 *part.* Coke *v.* Bainforth.

Debt upon an Obligation. The Defendant pleaded, That the Plaintiff was indebted unto him, *& conceſſit ſolvere*, and pleadeth a foreign Attachment in *London*. The Plaintiff *proteſtando, quod non habetur tale Record. pro placito dicit*; That he *pro diverſis Denariorum ſummis per ipſum præfatum* R. *prius debitis, non conceſſit ſolvere* the ſaid ſumme, *modo & forma, prout*, &c. Whereupon the Defendant demurres, and to be adjudged to be a good Barre, for the Debt is well traverſed. Wherefore it was adjudged for the Plaintiff.

12. *Con-*

12. *Concerning Lands in* London.

BY the Custom of *London*, Lands are pleadable in the *Hustings*. 15 E. 4. 9. Co. 4. Inst. f. 247.

Of Lands holden, no Writ doth lye but in *London*, according to the Custom. *Dyer* 15 *Eliz. f.* 317.

13. *Concerning Debtors becoming Fugitives.*

CUstom of *London*, that if a Debtor be Fugitive, he may be arrested, before the day, to finde better Security. *Vi. Man. Cust.* 83. 5 E. 4. 30. Hob. Rep. f. 86. Day v. Savadge. Co. Lib. 8. f. 126.

Custom of *London*, that the Creditor may arrest his Debtor to finde better Security. 11 *H.* 6. 3. *a.*

14. *Concerning the Enrollment of Devizes.*

BY the Custom of *London*, a Devize of Lands is not good, unless it be inrolled within a certain time. Cro. 1 part. Parman v. Bowyer. 669.

15. *Con-*

15. *Concerning the enrolling of a Testament of Goods.*

IT is a Custom of *London*, that a Testament of Goods there, shall be inrolled in the *Hustings*.

16. *Concerning Free-mens Executors.*

IT is the Custom of *London* for Executors of Free-men to give Bond in Court of *Orphans*, as well as the *Spiritual Court*. As for Example:

Hob. Rep. Luch's case, f. 247.

One *Luch* was brought to the Barre by *Habeas Corpus cum Causa*, directed to the Maior, Aldermen, and Sheriffs of *London*, who certified the Cause as followeth. That there hath been a Court of Orphans time out of minde in *London*, and that the custom hath been, That if any Free-man, or Free-woman die, leaving Orphans within age unmarried, that have had the custody of their Bodies, and Goods, and that the Executors and Administrators have used, and ought to exhibit true Inventories before them, and if any Debt appears due, to become bound to the Chamberlain, to the use of the Orphans, in a Reasonable Summe

Summe, to make a true account upon Oath of them till they will become bound, and then ſhewed, That one *Jane Cutler* Widow, being a Free-woman, *Fiſhmonger*, died, leaving divers Orphans, and that this man was Adminiſtrator, and had exhibited an Inventory of 1000 *l.* debt unreceived, and was required to give Bond of 2000 *l. ut ſupra*, and refuſed *per quod*, &c. And it was alledged for the Priſoner, that he was already bound in the Prerogative Court to make Accompt, and ſo he ſhould be twice bound: Alſo that he was informed that there was no ſuch Cuſtom for Widows of Free-men. But the Court anſwered, that they could not examine the truth of the Cuſtom, but the validity of it, and they held it Reaſonable enough, if it were true. And if the Eccleſiaſtical Court would impugn a Lawfull Cuſtom, the Court might grant Prohibition.

17. *Concerning Covenants.*

IT is a Cuſtom, That Writs of Covenant are maintainable without Specialty. *Vi. New Terms of Law. f. 96. a.* 27 *H.* 6. 10. *Nat. Brevium, f.* 103.

Covenant in *London* upon a Bill, and without Specialty by the Cuſtom. 22 *E.* 4. 2. 22 *E* 4. 2.

18. *Con-*

18. *Concerning Law-Gager relating to Merchants Books.*

Perkins, Tit. Faitz. f. 27. IT is a Cuſtom of *London*, that a man ſhall not wage his Law againſt Merchants Books.

19. *Concerning Law-Wager for Tabling.*

1 *E.* 4. *b.* IT is a Cuſtom of *London*, that *Law-Gager* ſhall not be allowed for Tabling againſt the Teſtimony of an Alderman. Or, it is the Cuſtom of *London*, that in Debt for Tabling the Defendant ſhall not have his Law. 1 *E.* 4. 5.

20. *Concerning Law-Wager, ouſted upon Oath.*

1 *E.* 4. 5. 2 *R.* 3 16. CUſtom of *London*, That if the Party Plaintiff, in Debt upon a Contract produce two men before the Maior, *&c.* that he will ſwear the Debt is true and Reall, that he ſhall be ouſted to have his Law.

21. *Con-*

21. *Concerning Diſtreſſes.*

IT is a Cuſtom of *London*, that Beaſts diſtreined, or Goods taken in *London* ſhall not be Replevizable, by Writ out of the Chancery, but by the Sheriffs of *London*. Dyer, f. 245. b.

22. *Concerning* Fide-juſſors *or Pledges.*

IT is a cuſtom of *London*, that an Action of Debt lyes againſt Pledges without Writing. 1 E. 4. 6. 43 E. 3. 11. a. b.

23. *Concerning the Liberty of entring upon anothers Ground.*

IT is a cuſtom of *London* to put Ladders, or things upon the Land, or Ground, of another, or Houſe adjoyning, to repair his Houſe.

24. *Concerning Devizes in Mortmayn.*

IT is a cuſtom in *London*, that Free-men there, may by their Teſtament inrolled bequeath their Lands that they be ſeiſed of to whom they will, except to *Mortmayn*;

and if they be Citizens, and Free-men that they may also bequeath their Lands to *Mortmayn*. As for Example:

5 *H.*7.10.*a.* 19.*a.b.* In an Action of Trespass brought in *London*, &c. the Defendant alledged a Custom in *London*, that every Citizen may devize his Land, and conveyed to him a Title by the Devize of a Citizen, and gave colour to the Plaintiff: And the Plaintiff having taken a Traverse, that there was no such Custom. The Defendant afterwards was well apprized of the Custom, that it ought to be a Free-man, and Citizen, for Citizen is not sufficient, wherefore he amended his Plea, and the other took Issue, that he was not a Free-man that devized, *&c.* And so you see the custom is, that a Citizen, and Free-man may devize, but not a Citizen only.

Vi. Cro. 3 part. *Launcelott* v. *Allen*, f. 248. *The Maior and Commonalty of* London, f. 575. *The King* v. *Bagshaw*, f. 347.

25. *Concerning Trades.*

CUstom of *London*, That one being Apprentice, and made Free-man, may use any Trade:

Informa-

Information by *Flecher* for the King and himſelf againſt *Bagſhaw*, and demands 22 *l.* upon the Stat. of the 5 *Eliz.* for Occupying the Trade of Goldſmith not being Apprentice: The Defendant pleaded the Cuſtom of *London*, That one being an Apprentice for ſeven years, and made Free-man of *London*, of any Trade, may uſe any other Trade in the ſame City; and ſhews, That he was bound an Apprentice in the Art of the Cordwayners, and ſerved therein for ſeven years, and was made Free-man of *London*, whereby he juſtifies, *&c.* The Iſſue being joyned, whether there were ſuch a Cuſtom as is pleaded? *Littleton*, Recorder of *London* certified, *Ore tenus*, That there was not any ſuch Cuſtom generally; for he ſaid, that the Cuſtom is not, That one brought up as an Apprentice in the Trade of Goldſmith, Cutler, *&c.* being a Free-man of *London*, by colour thereof may uſe any other Manual Trade: But one of a Trade, who uſeth Buying and Selling, may exerciſe another Trade of Buying, and Selling. But this he did not mention in his Certificate, but generally, *Ore tenus*, certified, That there is no ſuch

Cro. 3 *part.* The King *v.* Bagſhaw. *f.* 347. 361.

Cuſtom as is pleaded. *Vi. Cro.* 3 part. *Appleton* v. *Stoughton*, f. 516.

26. *Concerning a Feme Sole Merchant.*

21 *H.* 7. 38. *a.* 1 *E.* 4. 6. 35 *H.* 6. 25.

IT is a Cuſtom of *London*, That a Feme Covert Sole Merchant ſhall be impleaded, and implead without her Husband. Or, a Cuſtom that a Feme Covert being a Sole Merchant, may have an Action without her Husband, and an Action maintainable againſt her without her Husband.

Upon an *Habeas Corpus* to *London*, to remove the Body *cum Cauſâ* of the Wife of *Benett*, it was returned, That an Action of Debt was brought againſt her, and her Husband in *London*, as a Feme Sole Merchant, for Wares bought by the ſaid Wife, wherein the Husband is only named for Conformity, and by the Cuſtom, the Execution ſhall be only againſt her: Upon this returned before the Lord *Richardſon*, he took Bayle *de Bene eſſe*, becauſe it was affirmed, that the Feme Merchandized only for her Husband, in buying Wines (her husband being a Vintner) in which Caſe it ſeemeth, ſhe is out

out of the Cuſtom, and ought not to be charged; and it was moved to have the Direction of the Court, what ſhould be done, for the Feme continued in Priſon, and the Cuſtom of *London* was read, That a Feme Sole Merchant is where the Feme trades by her ſelf in one Trade, with which her Husband doth not meddle, and buyes, and ſells in that Trade; there the Feme ſhall be ſued, and the Husband named only for Conformity, and if Judgment be given againſt him, Execution ſhall be only againſt the Feme, and *Richardſon* and *Yelverton* conceived, That ſhe ſhould be diſcharged; for when it appears by Examination, that ſhe uſed the Trade which her husband uſed, ſhe in Law is but ſervant to her Husband, and the Wares coming to his uſe, he by Intendment is to be ſued; and this Caſe is out of the Cuſtom, for it ſeemeth this Cuſtom intendeth only where the Feme uſeth one Trade, and the Husband another, and doth not meddle with his wifes Trade, nor the Wife with the Husbands; but when ſhe deals in her husbands Trade, and in none other, it ſhall be accompted her Husbands Trade, and then the Husband ought to be ſued, and not the Wife;

Cro. 3 part. Langham *v.* le Feme de John Bewer, *f.* 68, 69.

But *Hutton*, *Harvy*, and *Coke* were of another Opinion; foraſmuch as the Writ had returned, That ſhe was ſued in *London* as a Feme Sole Merchant, according to the Cuſtom of *London*, and therefore this is ſuch an Action, and Cauſe, wherewith this Court ought not to meddle, nor take Conuſance, nor can give the party Relief, although he had good cauſe of Suit; for in *London* they are Judges of their own Cuſtoms, and by Intendment will proceed in their Courts there, according to their Cuſtoms, and not otherwiſe, and therefore we ought not to take away their Priviledges, nor remove the Action out of that Court, where we cannot give Remedy in this: And it is a foreign ſurmiſe, That it appears not in the Return, the Feme uſed the ſame Trade her Husband uſed, alſo they conceived, although ſhe uſed the ſame Trade that her Husband at any time uſed, as in this Caſe is pretended, yet becauſe at that time of the Contract (as was affirmed) the Husband did not meddle with the Trade, but ſhe only uſed it, and the Husband was then in the Kings Service, beyond Seas, as a Souldier, although he now returned bare, and needy, yet did he not meddle

with

with the Trade (as was affirmed by Oath) and theſe Contracts were made in his Abſence (as was likewiſe teſtified by Oath) It is no Reaſon to accept Bayl, where an Action cannot be grounded upon that Contract in this Court. But to remand the Cauſe, according to the Books, 1 *Ed.* 4. 6. 35 *H.* 6. 28. 9 *E.* 4. 35. 21 *H.* 7. 18. But afterwards it was agreed, and compounded, and nothing done. *Vide Mich.* 29 *H.* 6. *Rot.* 344. betwixt *Geppings*, and *Harding*. This Caſe pleaded, and Iſſue taken by delivery of the Feme, and found for the Plaintiff, That ſhe was not a Feme Sole Merchant: So that every Feme which tradeth in *London*, is not a Sole Merchant.

27. *Concerning Actionable Words.*

IT is a Cuſtom of *London* to maintain an Action on Scandals, and words of Defamation, that are not Actionable in a Court at *Weſtminſter*. As to this Cuſtom take theſe following Reſolutions: *Cro.* 3 *part.* Dimmock *v.* Fawcet. 393, & 394.

Margaret Hart brought an Action in the Sheriffs Court in *London* againſt ano-

ther woman, for saying, *That she was an arrant Whore, and went from Chamber to Chamber playing the Whore.* This was removed by *Habeas Corpus* into the Kings Bench, and Bayl put in. *Stone* moved for the Plaintiff, to have the Cause remanded, because for these words Action lies not here, but they were actionable there by the Custom of *London*, because she is punishable for such offence. But the Court denyed to grant a *Procedendo*, and said, an Action lyes not for these words; but that she should be sued for Defamation in the Spiritual Court only.

Cro. 3 *part.* Harts case, 350.

Cro. 3 *part.* Bower & his Wife, *v.* Cooper, *f.*486,487.

Action upon the Case in *London*, for words of the Feme, *Thou art a Whore, and a Two-penny Whore.* Upon an *Habeas Corpus* this Cause being removed, *Croke* signed a *Prodecendo*; Because he was informed it is good cause of Action in *London* by the Custom (for they ought to punish such persons with Carting and Whipping) and that it lyes not in this Court. And now *Pheasant* moved to have a *Supersedeas*, and the Cause removed; for he said it was against Law, to suffer such Actions to be prosecuted in

in *London*, upon pretence of a Cuſtom, where they are not maintainable in a Superiour Court: But *Stone* prayed, That no *Superſedeas* might be granted, for he ſaid, an Action lies in *London*, for theſe words by Cuſtom: Becauſe a Whore there is to ſuffer Corporal puniſhment, *viz.* Carting, and Whipping: And it is an Offence preſentable at the *Wardſmotes* Inqueſt, and there puniſhable; ſo being ſubject to a corporal puniſhment, it is reaſon ſhe ſhould have her Action there. And if the party conceives himſelf grieved, he may have a Writ of Error; and if againſt Law, may reverſe it: And cited *Trin.* 8 *Car.* ſuch a Cauſe being removed by *Habeas Corpus*, A *Procedendo* was awarded in this Court upon debate. And ſo all the Court held here, except *Berkeley*; who conceived that a *Superſedeas* ought to be granted. And it was alledged by *Stone*, That by the Stat. of 21 *Jac.* after a *Procedendo* is awarded, no *Superſedeas* ought to be granted. But the whole Court was againſt him in that poynt: For when a *Procedendo* unduely *vel improvide emanavit*, the uſe is to grant a *Superſedeas*. But here it was conceived by *Jones*, *Brampſton* and *Croke*, That the

Procedendo

Procedendo was well awarded; therefore we denyed to grant a *Superſedeas.*

Co. Lib. 4. f. 18. Oxford & his Wife v. Croſſe.

The Plaintiff brought an Action in *London*, for calling the Wife of the Plaintiff *Whore*, the Defendant removed this out of *London* by *Habeas Corpus*, a *Procedendo* was prayed, becauſe the Action was maintainable in *London*, though not at the Common Law; denyed by the Court, for ſuch Cuſtom to maintain an Action for brabling words is againſt Law.

28. *Concerning Probate of Wills.*

Regiſter, f. 246. Cro 3 part. Netter v. Brett, f. 396.

WIlls of Lands in *London* are firſt proved before the Ordinary, and after by Cuſtom before the Maior in the *Huſtings.*

Vi. Perkins, Sect. 577.

29. *Concerning Porcells.*

CUſtom of *London*, that if Porcells go in the Streets, that they ſhall be killed.

30. *Con-*

30. *Concerning Lands, deviſed by the Baron to the Feme.*

BY the Cuſtom of *London*, the Husband may deviſe to his Wife Lands for Term of Life, but no greater Eſtate. 18 E. 3. 8. a. 44 E. 3. 33. Vi N.B. f. 86. b. 87. a. b.

31. *Concerning the Wifes Devize to the Husband, or to a Stranger.*

IT is a Cuſtom of *London*, That a Feme may devize to her Baron, or to an Eſtranger with the Aſſent of the Baron. Kitchin, f. 151.

32. *Concerning Laws, & Statutes.*

BY the Cuſtom of *London*, Statutes may be made, but not for matter of Inheritances. 49 E. 3. 3. b.

33. *Concerning Joynt-Tenants.*

CUſtom in *London*, that a Joynt-Tenant may devize. 49 E. 3.

34. *Con-*

34. *Concerning the Writ* Ex Gravi Querela.

CUſtom of *London* it is, to have an *Ex Gravi Querela*, upon a Deviſe of Lands there.

35. *Concerning Bargain, and Sale*, &c.

IT is a Cuſtom of *London*, That Land paſs by Bargain, and Sale, and not by Livery, and Inrollment. *Yelvertons Reports, Darby* v. *Bois*, f. 124.

36. *Concerning the Husbands Capital Houſe.*

CUſtom of *London*, that a woman ſhall have the Capital Houſe, or all the Land of her Husband as long as the time that ſhe continues unmarried.

37. *Concerning the Arbitrarineſs, relating to the Ages of Orphans.*

23 E. 3. 31. *Gard. Hob. Rep.* 95. *Moor* v. *Huſſey.*

THE Committee of an Orphan, by the Maior, and Aldermen of *London*, declaring upon their Cuſtom ſhall have

have the Writ, and Age, and Nonage ſhall be limited by them.

38. *Concerning Attachments.*

BY the Cuſtom of *London*, A Citizen may attach the Goods of Foreigners for his ſatisfaction, to whom the ſaid Foreignor oweth money. *Dyer, f.85. & 196.*

Cuſtom of Foreign Attachment is, that after Judgement, and Execution, that the third perſon ſhall be diſcharged againſt the Demandant. The Cuſtom extends to Foreignors alſo. *21 E. 3. 32 & 33.*

As to Attachments take theſe ſeveral Reſolutions following.

Memorandum, That upon the matter in debate, betwixt *Roberthon*, and his Wife, and *Norroy*, the King of Heraulds, *Brooke* Serjeant at Law, and Recorder of *London*, certified in writing, That if a man ſue another before the Maior, *&c.* and a third perſon is indebted to the Defendant in as much as the Suit of the Plaintiff is, and by the Cuſtom of Law of Attachment, the third perſon is condemned, and judgement given againſt him: That notwithſtanding the Judgement, if no Extention be ſued againſt the third perſon, the *Dyer, 82. b.*

the Plaintiff may reſort to have Judgement, and exemption againſt the Defendant, being his principal Debtor. And alſo he may ſue the third perſon for his Debt, notwithſtanding the Judgement unexecuted, *&c.*

Dier, f. 196. *b.* A Citizen of *London* is indebted to a Foreignor by Obligation, and the Obligee is indebted again to the ſame Debtor upon a Simple Contract, and the Obligee makes his Executors, and dies, the Obligor by the Cuſtom of *London* ſhall have an Action of Debt againſt his Executors of the Obligee in *London*, upon his Oath, that it is a due, and true debt, which the Teſtator owed unto him in his Life, and upon a *Nihil* returned, *Nec eſt inventus*, he may make an Attachment of the Debt, which is detained of the Executors of the Obligee for his own Debt, upon four defaults recorded, according to the cuſtom of Foreign Attachment, and ſurely found by Mainprize, That if the Executors within a year and a day, cannot diſprove the Debt, or reverſe the Judgement, *&c.* he ſhall be diſcharged of ſo much of the Debt, which he owed upon the Obligation.

Coke

Coke ſaid, it was adjudged in that caſe, That a Debt upon Record by Recovery, or otherwiſe, cannot be attached by the Cuſtom of the City of *London*. *Cro. 1 part.* Parrots Caſe, *f.* 63.

Debt upon an Obligation of 100 Marks: The Condition was, if he pay 50 pounds, the Bond ſhall be voyd, the Defendant pleads Tender at the Day, and none was there to receive it, and upon this they were at Iſſue, and afterwards the Defendant pleads, that *Puis le darrein Continuance*, this 100 Marks were attached in his hands in *London*, at the Suit of, *&c.* *Gawdy*, Serjeant ſaid, the Plea was not good; for an Attachment cannot be pending a Suit in the Queens Bench; alſo he pleads, the fifty pounds was tendred, and ſo the 100 Marks were not due, and the Attachment cannot be of 100 marks; and this is no ſuch plea, as can be pleaded *puis le darrein Continuance*, for this ariſeth by the Defendants own Act, and may be intended to be by *Covin*, and the Court was in doubt for the firſt point, and commanded that Preſidents be ſearched, if any ſuch Attachment had been allowed pending a Suit here, or in the Common Bench. But they held that the Attachment *Cro. 1 part.* Pell *c.* Pell, *f.* 101.

Attachment of 100 marks (if Attachable) was well enough, for it is alwayes to be demanded in that manner, and it is according to the Obligation. And to the third, they held it may be well pleaded, *puis le darrein continuance*, for it goeth in Barre at another day; *Dalton* ſhewed a Preſident in the Common Bench, *Mich.* 12 & 13 *Eliz.* 164. Such Attachment was made pending the Suit, and after the Laſt continuance, but afterwards the parties compounded.

Cro. 1 *part.* Babington *v.* Babington, *f.* 157.

Debt. The Defendant pleads a Foreign Attachment in *London*, which was after Appearance, and pending the Action, and after Adviſement, it was ruled to be no good Plea, but no cauſe was ſhewn, and the Defendant had a day to plead Peremptory, or a *Nihil dicit* to be entred. *Wray* ſaid, This will be a Preſident for the time to come.

Cro. 1 *part.* Dalton *v.* Selly. 184.

Debt. It was held *per Curiam*, that a foreign Attachment cannot be of a Debt, before it be due, and therefore whereas one was indebted in a ſumme of money to be paid at *Michaelmas*, and it was attached before *Mich.* but the Judgement of

of the Attachment was not till after *Michaelmas*, it was clearly held to be voyd, becauſe it was not due, when attached.

Debt upon an Obligation. The Defendant pleaded, That one *Jaques* brought Debt in *London* againſt the Plaintiff, and according to the Cuſtom there, attached his Debt now demanded, in the Defendants hands, and pleads the Recovery, and Judgement there, *&c.* The Plaintiff replies, That before the Attachment, the ſaid *Jaques* brought Debt in the Qu. Bench againſt the now Plaintiff for the ſame Cauſe; and hanging that Suit this Attachment was made, *&c.* And it was thereupon demurred. And *Glanvil* for the Defendant moved, That the Plaintiff ſhould be barred; for although one cannot attach a Debt in *London*, for that a Suit is here depending in the Queens Bench (as it formerly hath been ruled in this Court) yet one, who hath conceived an action here, may affirm a Plaint in *London* for the ſame Debt, and may make an Attachment of the Parties Debt according to the Cuſtom. For there the Debt in Queſtion is not touched by the Attachment. And the Plaintiff might *Cro.* 1 *part.* Leuknor *v.* Huntley. 593.

now have pleaded this Attachment in Barre, for ſo much of his Debt in the Action brought in the Queens Bench. And the Opinion of the whole Court was, That the Plea in Barre was good: And Judgement was commanded to be entred accordingly.

Debt for 40 l. The Defendant pleads, That the Plaintiff was indebted unto him in 40 *l.* and he therefore a Plaint in *London*, and there this Debt in demand was attached in his hands; And he pleaded the foreign Attachment in Certain, and the Judgement thereupon, *&c.* The Plaintiff replies, That he was not indebted to the Defendant in 40 *l.* nor in any other ſumme; And it was thereupon demurred by *Tanfield*; For the Debt is not now traverſable, becauſe it is recovered in *London*: *Et non diſrationatur*, within the year, and day, as it might be by the Cuſtom. And *Coke* moved, That the Replication is good: For whether he were indebted, or not, is very well iſſuable; For if he were not indebted, they in *London* could not attach the Plaintiffs Debt by a foreign Attachment for nothing. And ſo was the Opinion of the whole Court.

Cro. 1 *part.* Paramore *v.* Payn.

Debt

Debt upon a Bill Obligatory of 13 l. 13 s. 4 d. The Defendant pleaded a foreign Attachment in Barre, made in *London* by one *Maulton*, to whom *Humfrey* was indebted, of 13 pounds in his hands, after the Original Writ purchased, and before the Return of the Exigent, or Appearance thereupon, and before he had any notice of the Suit in the Common Bench. And it was thereupon demurred, and adjudged to be no Plea. Because this Attachment was made, when the Suit was depending in the Common Bench: And the Queens Court being possessed of a Cause, it is insufficient, and cannot be: For as *Walmsley* said, The Suit depending the Queens Court, the said Court is interessed therein; and it is against the Dignity thereof to have an Inferiour Court to meddle with it: Also whilest the Suit is depending, it is *Quasi in Custodia Legis*, and cannot be medled with by another: As the Law is, where one is to be attached by his goods at the Common Law, if the goods be distreined, and impounded, they cannot be attached. Wherefore it was adjudged for the Plaintiff. *Cro. 1 part.* Humphrey *v.* Barns. *f.* 691.

A. is indebted to *B.* and *C.* and this debt is attached in the hands of *A.* as a Debt due to *B.* by the Custom of *London*, this is a Barre against *C.*

21 *H.* 6. 48. *a.*

Audita Querela: For that the Defendant recovered against him this Debt in the Court of Queens Bench, and was in debt to the Plaintiff in another Debt, he attached it in his own hands in *London*, and upon this brought the *Audita Querela*; and it was clearly held the *Audita Querela* did not lye, for this Inferiour Court cannot fetch this Debt out of this Court, and this Debt is not attachable, as it was adjudged in Sir *Jo. Parrots* Case, and Execution was awarded.

Cro. 1 *part.* Kerry *v.* Bowyer, 186.

A man was bound in an Obligation on Condition to deliver to the Obligee Allome, to the value of 30 *l.* at a certain day, and before the day attaches the Allome in his own hands by the Custom, this is no discharge of the Obligation.

17 *E.* 4. 7.

Error of a Judgement in the Common Bench. The Case was, That *Lenknor* brought Debt against the said *Huntley*, who pleaded how one *Jaques* affirmed a Plaint of Debt in *London* against the said *Lenknor*; And by the Custom there attached

attached that debt now demanded in the hands of the ſaid *Huntley*, and pleaded the Recovery, and Judgement there. Whereto the Plaintiff replied, That, before the Attachment, *Faques* brought Debt in the Queens Bench againſt the ſaid *Lewknor*, for the ſame debt; whereupon he made an Attachment, whileſt that Suit was depending, *Et hoc, &c.* And upon this Plea *Huntley* there demurred in Law, and it was adjudged for *Huntley*: Whereupon *Lewknor* brought Error: One of the Errors aſſigned was, Becauſe the Debt is attached in *Huntleys* hand before the day of payment, upon the Condition, and ſo before it was due. And *Popham* ſaid, That it could not be a good Cuſtom: But it was moved, That herein the Cuſtom ſhould be Reaſonable; Becauſe it is not to be payd before the day of payment. But in regard that the leſſer ſumme in the Condition is a preſent Duty, it might be attached preſently; and by the Judgement in the Attachment, the Debtor is diſcharged againſt his Creditor, and become chargeable to the Plaintiff in *London*. So that after the day of payment, he ſhall have his Execution againſt the Debtor, and not

before. But *Popham* ſaid, That the Judgement herein was unreaſonable; For the Creditor hath not above one year *diſrationare Debitum*. And if the Debt might be attached a full year, or more, before the day of payment; he may never hear of it, before the year be paſt, and ſo be defrauded of his Debt. But *Daniel* Serjeant ſaid, That the time *Diſrationare debitum*, is a year after the Execution ſued, and not forthwith after the Judgement. And Execution cannot be had, untill after the day of payment. *Popham*, *Cluich*, and *Fenner*, *abſente Gawdy*, held, That the Attachment of this Debt before the day of payment cannot be.

39. *Concerning Single Contracts.*

Co. Lib. 8. f. 126. IT is a Cuſtom, that an Action of Debt ſhall be maintained againſt Executors upon a Simple Contract. As for Example.

Snelling brings Debt upon an Obligation againſt an Adminiſtrator, who pleads there is a Cuſtom in *London*, that an Adminiſtrator ſhall pay Debts upon Contract to a Citizen as well as upon Obligation,

gation, and that *J. S.* upon a Contract had recovered, and good. *Co. Lib. 5. f. 82. Snellings Case.*

1. Resolved, although that the Debt is given against an Administrator by the Stat. of 31 *E.* 3. yet because they were charged as Executors before, so that only the name is changed, the Custom generally alledged is good.

2. The Custom bindeth Strangers.

Debt against *Norton* as Administrator of one *Norton* upon an Obligation. The Defendant shews the Custom of *London* to be, that if a Contract be made by a Citizen to pay money to another Citizen, and he who made the Contract dies, that his Executors, or Administrators shall be Chargeable therewith, as if it were upon an Obligation; and shews further how the Intestate was indebted on a Contract to one *A.* who had recovered against him, and that he had *Ryens ouster en ses mains, &c.* And it was thereupon demurred. *Glanvill* moved, that this Custom was not good; for first it is against Law, that a stranger should be barred of his Debt upon a Specialty, by reason of a Debt upon a Simple Contract. Secondly, it is against Law, that an Executor or Administrator should be charged *Cro. 1 part. Snelling v. Norton, f. 409.*

upon a Simple Contract, *&c. Daniel è contrà*: The Cuſtom was always to bind the Executors or Adminiſtrators to pay Debts upon Contracts, and Cuſtoms in *London* are confirmed by Parliament, and are now as ſtrong as a Statute. And therefore in *London* they preſcribe to give Land in *Mortmayn*, which is againſt Statute Law, and there is not any Cuſtom but that it deprives, and is againſt the Common Law in ſome point. And this Cuſtom is reaſonable; for a Debt upon a Contract is as well due as a debt upon an Obligation; and therefore there is as great Reaſon for the payment of the one, as of the other, although the Law hath given a greater Prerogative, *viz.* a Priority of paying the one, rather than the other: And although it might ſeem hard to have allowed this Cuſtom in this Court, if it had been Originally pleaded here, yet when the Cuſtom hath been executed againſt the Adminiſtrator by the Laws of the City, whereto he is ſubject, it would be miſchievous unto him to be diſallowed it here: For then he ſhould be twice charged without Remedy; and this difference is taken in 1 *E.* 4. 8. *Owen* Juſtice, the Cuſtom is reaſonable; for the

Executor

Executor in Conſcience is bound to pay debt upon a Contract as well as upon Specialty, and of that opinion were the other Juſtices, eſpecially as this Caſe, being executed againſt him, who is lyable, and chargeable by the Cuſtoms of *London*.

40. *Concerning Villeins.*

CUſtom of *London*, That if a Villein has remained there a year, and a day, that he ſhall not be drawn out by any Proceſs of Law. Or *London* preſcribes, That a Villein ſhall not be taken out of the City, nor attached by *Capias*. 7 *H.6.* 32. 35 *H.6.* 26. *Vi. Kitchin*, *f.* 567.

41. *Concerning Reparations.*

IT is a Cuſtom of *London*, That the Leſſor ought to repair the Houſes during the Leaſe. 27 *H.6* 10.

42. *Concerning the Sheriffs.*

THE Sheriffs of *London* claym Wayfes by Preſcription. 13 *E.*4.10.

43. *Con-*

43. *Concerning Avowterors.*

1 H. 7. 6. a. Co. 3 Inſt. f. 206. Lib. 8. f. 126.

CUſtom of *London*, That if an Information be made to a Conſtable in *London*, that one within their Juriſdiction is with a Woman in Avowtery, that he ſhall take the Bedle, and others of the ſame Pariſh, and go to the Houſe, and if they finde the man in Avowtery, they ſhall take, and carry him to the *Counter*, and leave him there.

44. *Concerning Goods apprayſed.*

11 H. 7. 1, & 2. 35 H. 6. 27.

CUſtom of *London*, that Goods attached ſhall be apprayſed, and delivered in execution to the Party in ſatisfaction of the Debt.

45. *Concerning Wager of Battell.*

Plowd. com. 335. b.

CUſtom of *London*, That no man ſhall wage Battell againſt a Citizen of *London*.

46. *Concerning Attaynts.*

Vi. Kitchin, f. 567. 21 H. 7. 17.

IT is a Cuſtom of *London*, that an Attayne ſhall not be brought otherwiſe than within the City, of a falſe Oath made there.

47. *Con-*

47. *Concerning the Moyety of the Husbands Goods.*

IT is a Cuſtom of *London*, That the Wife ſhall have the Moyety of Goods, whereof her Husband dyed poſſeſſed. *Cro 3 part. Lord Haſtings v. Dowglaſs, 344.*

48. *Concerning Apprentices.*

IT is a Cuſtom of *London*, That an Infant within 14 years may binde himſelf Prentice. *21 E. 4. 6.*

As to this Cuſtom take theſe Reſolutions.

Covenant, and declares, How the Defendant by Indenture had bound himſelf Apprentice to the Playntiff for ſeven years, and had covenanted, that he would not depart within the ſaid Term, and ſhewes, that he departed within the Term, whereupon he brought this Action. The Defendant pleads, that he was within the Age of 21. at the time, *&c.* The Plaintiff replies, That the Cuſtom of *London* is, That any Infant above the age of 12 years may binde himſelf to be an Apprentice. And upon this Replication it was demurred in Law, and the Cauſe *Cro. 1 part. Walker v. Nicholſon. f. 652, 653.*

Cauſe ſhewn, for that it was a departure in pleading. *Flemming* the Queens Sollicitor moved, That it was not any departure, but ſtands well with the Declaration, and in proof thereof cited 21 *H.* 7. 17. and anſwered the Book of 37 *H.* 6. 5. That where a Cuſtom is alledged generally, That any one may devize, *&c.* He cannot maintain it afterwards by another Cuſtom, That an Infant may devize, for there be divers Cuſtoms, and the Court ſeemed to doubt thereof, wherefore they would adviſe. But they ſaid, That notwithſtanding this Cuſtom, a Collateral Covenant ſhall not bind an Infant.

Cro. 2 *part.* Whittingham *v.* Hill, *f.* 494.

An Infant ſhall not be bound by his Bargain for any thing, but for his Neceſſity, *viz.* Dyet and Apparell, or neceſſary Learning: But his Buying to maintain his Trade, although he gain thereby his Living, ſhall not binde him, nor his Covenant to binde himſelf Apprentice, unleſs it be by Special Cuſtom.

Note, It was reſolved by the Juſtices of the Kings Bench 5 *Car. Regis*, That although an Infant may voluntarily binde himſelf,

himſelf Apprentice; and if he continue Apprentice for ſeven years, he may have the Benefit, and uſe of his Trade: yet neither at the Common Law, nor by any words of the Statute of 5 *Eliz.* a Covenant, or Obligation of an Infant for his Apprentiſhip ſhall binde him. But if he misbehave himſelf, the Maſter may correct him in his ſervice, or complain to a Juſtice of Peace, to have him puniſhed, according to the Statute; But no Remedy lyeth againſt an Infant upon ſuch Covenant.

Cro. 3 part. Gylbert *v.* Fletcher, *f.* 179.

49. *Concerning Inqueſts.*

IT is a Cuſtom of *London*, that they ſhall not be impanelled upon Inqueſts out of the City, and that they ſhall not joyn with foreigners.

11 *H.* 7. 14. *Dyer, f.* 40, & 46.

50. *Concerning Granage.*

THere is a Cuſtom in the City of *London*, called *Granage*, *viz.* That the Lord Maior for the time being ſhall have of every Alien, that brings into the Port of *London* any Salt, the twentieth part of it.

18 *Eliz. Dyer, f.* 351. *b.*

51. *Con-*

51. *Concerning Recognizances.*

THe Lord Maior of *London* uſeth to take Recognizances by Cuſtom there. As for Example:

Debt upon a Recognizance taken in *London* and declareth, that the Maior there had uſed to take Recognizances by Cuſtom of all except Infants, and Feme Coverts, and upon any day except Sunday, and certain other dayes ſpecially named, and this Recognizance was taken before the Maior there. *Tanfield* alledged divers Exceptions in Arreſt of Judgement. 1. The Cuſtom is unreaſonable, *viz.* to take Recognizances of all perſons, except Feme Coverts, and Infants, and doth not except men *de non ſane memory: ſed non allocatur*, for ſuch may acknowledge a Recognizance, and have no Remedy to avoyd them, and therefore they are excepted which may. 2. Exception, that it is not averred that the Defendant was not an Infant, *&c.* or that the day upon which it was taken, was none of the excepted dayes: *Sed non allocatur*; for it ſhall be intended, if the contrary be not

Cro. 1 *part.* Chamberlayn *v.* Thorp. *f.* 186, 187.

not ſhewn by the Defendant; and ſo the Juſtices ſaid the Law is clearly taken at this day upon the Statute of 1 *R.* 3. to plead a Feoffment by Ceſtuy que uſe. 3. Exception, that none can take Recognizances but Juſtices of Record, which had Authority by Patent, *&c.* as the Juſtices of the Bench, and Juſtices of Peace by Commiſſion, and the Maior is not a Judge of Record, but by Cuſtom, *ſed non allocatur*, for the Cuſtom is good, and the Cuſtoms of *London* are confirmed by Parliament, and are good, though ſtrange; and ſo it was adjudged in this Court of Queens Bench betwixt *Mable*, and *Frying*. 4. Exception, the Cuſtom extends as well to Recognizances taken of Strangers as Citizens, or for matters within the City; and for this Cauſe *Gandy* held it was not good.

52. *Concerning Building on Old Foundations, and ſtopping of Lights.*

BY the Cuſtom of *London*, it is Warrantable to rebuild any Houſe upon the old Foundation, where the ancient Houſe ſtood, in Height at pleaſure of the party,

party, although by the Re-building the Lights of his Neighbour be ſtopped up, unleſs there be ſome Writing to the contrary.

Yelverton's Rep. Hughes *v.* Keame.

53. *Concerning Claims of Goods within a Year.*

IT is a Cuſtom in *London*, after I have arreſted the Goods of my Debtor in my poſſeſſion, and without Claim within a year, they ſhall be taken for my Duty.

35 *H.* 6. 25.

54. *Concerning Examination of Witneſſes* in perpetuam rei memoriam.

BY the Cuſtom of *London*, the Lord Maior, Recorder, and Aldermen there, being Juſtices of the Peace, have uſed to take the Depoſitions, and Examinations of any perſon produced before them, *in perpetuam rei memoriam*, and to keep thoſe Depoſitions upon Record in the Court of the *Guild-hall*, to be given in Evidence to a Jury for the better knowledge of the Truth between any perſons.

Cro. 1 *part.* Kimerſly *v.* Cooper, *f.* 168, 169.

55. *Con-*

55. *Concerning Contribution.*

IT is a Cuſtom of *London*, for one Obligor that payes the whole Debt, to have Debt *pro Rata*, againſt his Companion; or one joynt-Obligor ſhall have Contribution againſt his Companion by the Cuſtom of *London*. *Co. Lib. Iſtrat. 161.*

56. *Concerning Buying and Selling betwixt Foreignors.*

IT is a Cuſtom of *London*, that if one Stranger buy any thing of another Stranger, it ſhall be forfeited to the Maior and Commonalty of the ſaid City. As to this Cuſtom accept this Reſolution. *Cro. 1 part. Sims v. Foſter, f. 352.*

Action of Trover, and Converſion, of an Ox-hide of the Playntiffs in *Middleſex*, the Defendant pleaded that the City of *London* is an ancient City, and that there is a Cuſtom there, that *Si aliquis extraneus forinſecus è Libertate ejuſdem Civitatis* buy any thing *de alio forinſeco à Libertate prædict.* that it ſhould be forfeited to the Maior, and Commonalty of the ſaid City, and ſaith, that the Plaintiff *Extra-*

neus à Libertate, did buy the ſaid Oxe-hide of another foreignor, whereupon he ſeiſed it in *London*, to the uſe of the Maior, *&c. abſque hoc*, that he did finde it, and convert in *Middleſex*. And it was thereupon demurred. *Glanvil* argued for the Plaintiff, Firſt, that it was not a good and lawfull Cuſtom, and in proof thereof cited the Caſe, 36 *H.* 6. of Jewels of the Kings ſold, and 21 *H.* 7. 40. 3 *Eliz. Dyer*, 186, *&* 246. And the form of the Pleading he ſaid is not good, *viz. Si aliquis extraneus è Libertate*, but doth ſhew where the Liberty is, and the Traverſe is not good, for he ought to traverſe every County, beſides *London*, and not *Middleſex* only. *Anderſon*, and *Beamond* conceived the Form of the Pleading to be ill, but for the matter of the Cuſtom it ſelf, they doubted. *Owen* ſaid, the Cuſtom was good, and had been allowed before theſe times.

57. *Concerning the Corporation of Weavers.*

IT is a Cuſtom of the Weavers in *London*, that none are to intermeddle with their *Guild*, nor with their Art within the City, or *Southwark*, but thoſe of the Fraternity.

Action

Action upon the Case. Supposing, That the Playntiffs from time to time, whereof, *&c.* were a Corporation in *London*, &c. paying for it 20 *s.* 8 *d.* to the Queen *per annum*, *&c.* And that the Custom there is, *&c.* that none ought to intermeddle with their Guild, nor with their Art within *London*, or *Southwarke*, but those of the Guild: And that the Defendant being none of their Guild, had bought 40 pounds worth of Silk of one *R.* to be woven, and had weaved it, *&c.* The Defendant pleaded *Not Guilty*, and a Special Verdict found these Customs, *&c.* and that the Defendant, being a Stranger, had received of *R.* 40 pounds worth of Silk to be woven, and had carryed it to *Hackney*, and there had woven it, and had brought it back to *London*, and received his Salary, *&c. Et si, &c.* And hereupon all the Court resolved, That it was not any Offence; For although it were a good Custom, as they all allowed it was, being used, *&c.* yet this Contracting for it in *London*, and working of it in the Countrey, is not intermedling with their Trade in *London*; No more, than if a Taylor should buy Cloth, or receive any

Cro. 1 *part.* The Warden & Corporation of Weavers *v. Brown*, *f.* 803.

other thing in *London*, and make a Garment thereof in the Countrey; and although it be a Contracting in *London*, yet it is not intermedling with the Trade. Wherefore it was adjudged for the Defendant.

58. *Concerning Bargayn, and Sale by Paroll.*

Co. 3. Inſt. f. 675. IT is a Cuſtom of *London*, to bargain, and ſell Lands by Paroll.

Cuſtom of *London*, that Lands paſs by Bargayn and Sale, without Inrollment according to the Stat. of 27 *H.* 8. *c.* 16.

59. *Concerning the paſſing of the Wifes Land.*

IF a man, and his Wife paſs the Wifes Land in *London*, and ſhe be examined, it bindes her by the Cuſtom of *London*.

Co. Lib. 2. *Beckewithes* Caſe, *f.* 57. *a. b. Hob. Reports, Needler v.* Biſhop of *Winton, fol.* 225. *Cro.* 1 *part. Parman* v. *Bowyer, fol.* 669.

60. *Con-*

60. *Concerning Arreſts without Proceſs.*

IT is a Cuſtom in *London* to arreſt a man without Proceſs. Or,

Cro. 2 part. Mackaleyes Caſe.

It is a Cuſtom there, for any Serjeant to arreſt, after a Plaint entred in any of the Courts of the Counters. *Co. Lib.* 9. *Mackaleyes* Caſe, *f.* 68. *a.*

Cro 3 part. Salmon *v.* Percivall.

61. *Concerning the Recorders Certificate.*

IT is a Cuſtom of *London*, to certifie their Cuſtoms by their Recorder.

As to this Cuſtom take theſe Reſolutions.

The Cuſtoms of *London* that directly concern the Intereſt of the Corporation, are not tryable by their Certificate, but by Jury.

Hob. Rep. Dy *v.* Savadge.

The Playntiff ſurmiſed, That there is a Cuſtom in *London*, That if any Cuſtom of *London* be pleaded, and denyed, and iſſue thereupon, it ſhall be tryed by a Writ to the Maior, and Aldermen, to Certifie, whether there be ſuch a Cuſtom; and they ſhall make their Certificate, by the mouth of their Recorder, *Ore tenus*; and prayed to have a Writ to certifie, *&c.*

Cro 3 part. Appleton *v.* Stoughton.

And the Recorder certified, That there was no ſuch Cuſtom, *&c.* And after this Certificate it was moved, That this was a Miſ-tryall; for it being a Cuſtom, which concerns all the Citizens, ought not to be tryed by ſuch a Certificate, but by Jury: and *Bulſtrode*, who argued for the Defendant, inſiſted much upon a Caſe in the *Common Bench* reported by my Lord *Hobert*, That a Cuſtom of *London*, that concerns all the Citizens, ſhall be tryed *per pais*: But after long deliberation it was reſolved by all the Court, That the Tryall was good, eſpecially when the Plaintiff hath ſhewn, That there is ſuch a Cuſtom, That it ſhall be ſo certified, and the Defendant hath confeſſed it, ſo as the manner of Tryall being as it were by his Conſent, he ſhall not after ſuch Tryall except againſt it. And this Cuſtom doth not concern all the perſons of *London*, but only thoſe who uſe Manuil Trades: As if the Cuſtom to deviſe in *Mortmayn*, or of foreign Attachments, had been tryed by Certificate. Thus much of the Cuſtoms of the Noble City of *London*, that is *Camera Regis, Reipublicæ Cor, & totius Regni Epitome.*

FINIS.